

ARKANSAS CODE OF 1987 ANNOTATED

OFFICIAL EDITION



COURT RULES — VOLUME 2

Appellate Procedure • Civil/Criminal • Supersession • Supreme Court/Court of Appeals of Ark.
Admission to the Bar • Minimum Continuing Legal Education • Regs. of Ark. Continuing Legal
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U.S. Dist. Court for Eastern/Western Dist. of Ark. • U.S. Bankr. Courts for
Eastern/Western Dist. of Ark. • U.S. Court of Appeals for Eighth Dist.

ARKANSAS CODE OF 1987 ANNOTATED



COURT RULES

VOLUME 2

2012 Edition

Prepared by the Editorial Staff of the Publisher
Under the Direction and Supervision of the
ARKANSAS CODE REVISION COMMISSION

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4077729 (set)

4068329 (Volume 2)

ISBN 978-1-4224-8282-7



Matthew Bender & Company, Inc.

701 East Water Street, Charlottesville, VA 22902

www.lexisnexis.com

Preface

The two-volume set of the Arkansas Code of 1987 Annotated Court Rules contains rules of practice and procedure currently followed by the state and federal courts of Arkansas. Each set of rules is individually indexed. Rules have been edited for internal typographical consistency, but otherwise appear as promulgated by each court.

Original commentary to the Arkansas Rules of Criminal Procedure was drafted by Deputy Attorney General Frank B. Newell and Assistant Attorney General L. Scott Stafford. The 1987 unofficial supplementary commentary to the Rules of Criminal Procedure was prepared by Mr. Frank B. Newell; the conclusions stated are those of Mr. Newell, and the commentary has not been reviewed or approved by any state agency or court.

In some cases, rules, or their related commentaries, reporter's notes, etc., cite provisions of the obsolete Arkansas Statutes Annotated of 1947. These references can be translated easily by using Tables Volume A of the Code, beginning on page 79.

These volumes contain rules received by LexisNexis through July 12, 2012, for the state courts, the federal district courts, and the United States Court of Appeals for the Eighth Circuit.

Annotations are to the following sources:

Arkansas Advance Reports through 2012 Ark. LEXIS 273 (May 31, 2012)
and 2012 Ark. App. LEXIS 489 (May 30, 2012).

Federal Supplement through June 5, 2012.

Federal Reporter 3d Series through June 5, 2012.

United States Supreme Court Reports through June 5, 2012.

Bankruptcy Reporter through June 5, 2012.

Arkansas Law Notes through the 2008 Edition.

Arkansas Law Review through Volume 61, p. 787.

University of Arkansas at Little Rock Law Review through Volume 30, p. 267.

ALR 6th through Volume 64, p. 655.

ALR Fed. 2d through Volume 46, p. 473.

Suggestions, comments, or questions about this or any other volume of the Code are welcome. You may call our toll-free number, 1-800-833-9844, fax us toll free at 1-800-643-1280, email us at customer.support@bender.com or write: Arkansas Code Editor, LexisNexis, 701 East Water Street, Charlottesville, Virginia 22902. Visit our website at www.lexisnexis.com for an on-line bookstore, technical support, customer service and other company information.

August 2012

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User's Guide

Many of the Arkansas Code's research aids, as well as its organization and other features, are described in the User's Guide, which appears near the beginning of Volume 1 of the Arkansas Code of 1987 Annotated.

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QUICK ACCESS GUIDE

Volume 2

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RULES OF APPELLATE PROCEDURE — CIVIL

Rule

1. Scope of rules.
2. Appealable matters; priority.
3. Appeal — How taken.
4. Appeal — When taken.
5. Record — Time for filing.
6. Record on appeal.
7. Certification and transmission of record.

Rule

8. Stay pending appeal.
9. Extension of time when clerk's office is closed.
10. Uniform paper size.
11. Certification by parties and attorneys; frivolous appeals; sanctions.

Publisher's Notes. The Per Curiam dated July 10, 1995, provided, in part: "We hereby

adopt the Revised Rules of Appellate Procedure, to be effective on January 1, 1996."

Rule 1. Scope of rules.

These rules shall govern the procedure in civil appeals to the Arkansas Supreme Court or Court of Appeals. Whenever the words Supreme Court appear in these rules, the words Court of Appeals shall be substituted in applying the rules in a case in which jurisdiction of the appeal is in the Court of Appeals under Rule 1-2 of the Rules of the Supreme Court and Court of Appeals. (Amended May 5, 1980; adopted and amended July 10, 1995, effective January 1, 1996.)

Publisher's Notes. The Per Curiam orders of the Supreme Court entered on December 18, 1978, adopting the Rules of Civil Procedure, the Rules of Appellate Procedure and the Rules of Inferior Courts, read: "PER CURIAM. The Court, pursuant to Act 38 of 1973 and to its constitutional and inherent power to regulate procedure in the courts, hereby adopts the Rules of Civil Procedure submitted by the Civil Procedure Revision Committee, with modifications made by the Court. These Rules will be effective July 1, 1979. The court expresses its great appreciation for the untiring work done by the members of the Committee and for the various suggestions made by attorneys in response to the Court's invitation."

Reporter's Notes to Rule 1 (1994): This rule is a slightly modified version of former Appellate Rule 1. The word "civil" has been added to the first sentence to make clear that these rules apply only to appeals in civil

cases. The Reporter's Notes prepared in connection with former Appellate Rule 1 are set out below.

Addition to Reporter's Notes to Rule 1:

1. This rule makes it clear that these rules apply only to appeals to the Arkansas Supreme Court. They have no applicability to appeals from municipal, county, small claims courts, etc.

2. The Committee did not deem it necessary to draft comprehensive rules dealing with the procedure after the Arkansas Supreme Court has acquired jurisdiction of a particular case. The Supreme Court has periodically revised its own rules with the result that little or no change is necessary at that level. These appellate rules are basically a revision and condensation of prior Arkansas statutory law as it affected procedures prior to the time the Supreme Court acquired jurisdiction. Thus, these rules are much less comprehensive than the federal appellate rules.

CASE NOTES

Preemption by Special Statutes.

The Rules of Appellate Procedure are broad and general in their scope while § 11-9-711 may be characterized as a special statute governing appeals only in workers' compensation cases; in such cases, the special statute was intended to remain in force as an exception to the latter and more general enact-

ment. *Sunbelt Couriers v. McCartney*, 31 Ark. App. 8, 786 S.W.2d 121, aff'd 798 S.W.2d 92 (1990).

Cited: *Morgan v. National Pizza Co.*, 285 Ark. 61, 684 S.W.2d 812 (1985); *Saber Mfg. Co. v. Thompson*, 286 Ark. 150, 689 S.W.2d 567 (1985).

Rule 2. Appealable matters; priority.

(a) An appeal may be taken from a circuit court to the Arkansas Supreme Court from:

- (1) A final judgment or decree entered by the circuit court;
- (2) An order which in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action;
- (3) An order which grants or refuses a new trial;
- (4) An order which strikes out an answer, or any part of an answer, or any pleading in an action;
- (5) An order which vacates or sustains an attachment or garnishment;
- (6) An interlocutory order by which an injunction is granted, continued, modified, refused, or dissolved, or by which an application to dissolve or modify an injunction is refused;
- (7) An interlocutory order appointing a receiver, or refusing to wind up a pending receivership or to take the appropriate steps to accomplish the purposes thereof, such as directing a sale or other disposal of property held thereunder;
- (8) An order which disqualifies an attorney from further participation in the case;
- (9) An order granting or denying a motion to certify a case as a class action in accordance with Rule 23 of the Arkansas Rules of Civil Procedure;
- (10) An order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official;
- (11) An order or other form of decision which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties in a case involving multiple claims, multiple parties, or both, if the circuit court has directed entry of a final judgment as to one or more but fewer than all of the claims or parties and has made an express determination, supported by specific factual findings, that there is no just reason for delay, and has executed the certificate required by Rule 54(b) of the Rules of Civil Procedure;
- (12) An order appealable pursuant to any statute in effect on July 1, 1979, including Ark. Code Ann. § 16-108-219 (an order denying a motion to compel arbitration or granting a motion to stay arbitration, as well as certain other orders regarding arbitration) and § 28-1-116 (all orders in probate cases, except an order removing a fiduciary for failure to give a new bond or render an accounting required by the court or an order appointing a special administrator); and
- (13) A civil or criminal contempt order, which imposes a sanction and constitutes the final disposition of the contempt matter.

(b) An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. An appeal from an order disposing of a postjudgment motion under Rule 4(b)(1) brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from.

(c) Except as provided in Rule 6-9 of the Rules of the Supreme Court and Court of Appeals, appeals in juvenile cases shall be made in the same time and manner provided for appeals from circuit court.

(1) In delinquency cases, the state may appeal only under those circumstances that would permit the state to appeal in criminal proceedings.

(2) Pending an appeal from any case involving a juvenile out-of-home placement, the circuit court retains jurisdiction to conduct further hearings.

(3) In juvenile cases where an out-of-home placement has been ordered, orders resulting from the hearings set below are final appealable orders:

(A) adjudication and disposition hearings;

(B) review and permanency planning hearings if the court directs entry of a final judgment as to one or more of the issues or parties and upon express determination supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. Rule 54(b); and

(C) termination of parental rights.

(d) All final orders awarding custody are final appealable orders.

(e) Appeals in criminal cases have priority over all other business. With respect to civil cases, appeals under subdivisions (a)(6), (a)(7), (a)(9), (c)(3), and (d) of this rule take precedence.

(f)(1) The Supreme Court may, in its discretion, permit an appeal from an order pursuant to Rule of Civil Procedure 37 compelling production of discovery or an order denying a motion to quash production of materials pursuant to Rule 45 when the defense to production is any privilege recognized by Arkansas law or the opinion-work-product protection. A petition for permission to appeal must be filed with the Supreme Court within 14 calendar days after the order is entered. The circuit court's order shall be supported by factual findings and shall address the factors (a-f) listed below. The decision of the Supreme Court to grant permission to appeal will be guided by:

(a) the need to prevent irreparable injury;

(b) the likelihood that the petitioner's claim of privilege or protection will be sustained;

(c) the likelihood that an immediate appeal will delay a scheduled trial date;

(d) the diligence of the parties in seeking or resisting an order compelling the discovery in the circuit court;

(e) the circuit court's written statement of reasons supporting or opposing immediate review; and

(f) any conflict with precedent or other controlling authority as to which there is substantial ground for difference of opinion.

(2) The petition must address the factors listed in subdivision (f)(1) and shall be limited to 10 pages exclusive of supporting materials. Petitioner shall attach in an addendum sufficient supporting documentation from the circuit court record for the Supreme Court to understand the dispute and the issues that would be presented in the permissive appeal. A party may file a response within 10 calendar days after the petition is served. Any response

shall also be limited to 10 pages exclusive of any supplementary addendum. Replies and petitions for rehearings shall not be allowed.

(3) Neither the petition nor the grant of permission for an appeal shall delay any scheduled trial or lower-court proceeding unless the circuit court or the Supreme Court orders. If the Supreme Court grants the petition, the petitioner must file a notice of appeal with the circuit clerk within 10 calendar days of the Supreme Court's order and file the record on appeal within 30 calendar days from the entry of the order allowing the appeal. (Amended July 12, 1982; amended March 18, 1985; amended November 11, 1991, effective January 1, 1992; amended November 8, 1993, effective January 1, 1994; adopted and amended July 10, 1995, effective January 1, 1996; adopted and amended effective March 4, 1999; amended January 27, 2000; amended February 1, 2001; amended June 7, 2001, effective July 1, 2001; amended March 13, 2003; amended May 18, 2006, effective July 1, 2006; amended October 9, 2008, effective January 1, 2009; amended June 3, 2010, effective July 1, 2010; amended May 24, 2012, effective July 1, 2012.)

Reporter's Notes to Rule 2 (1995): This rule is virtually identical to former Appellate Rule 2, although the title has been changed to more accurately reflect its content. Subdivision (c) has been modified to expressly include the statement that criminal appeals take precedence in the Supreme Court, as was the case under former Rule 36.2 of the Rules of Criminal Procedure. The Reporter's Notes prepared in connection with former Appellate Rule 2 are set out below.

Addition to Reporter's Notes to Rule 2:

1. Act 38 of 1973, authorizing the Supreme Court to prescribe rules of civil procedure, provides that rights of appeal shall continue as authorized by law. Accordingly, in this rule the Court has preserved rights of appeal as conferred by superseded Ark. Stat. Ann. § 27-2101 (Supp. 1971), superseded § 27-2102 (Repl. 1962), and superseded § 31-165 (Repl. 1962). If, at the effective date of these rules, there are other statutes conferring rights of appeal from trial courts, they are not intended to be superseded.

2. An order dismissing a writ of garnishment is appealable. *Bank of Eudora v. Ross*, 168 Ark. 754, 271 S.W. 703 (1925).

Addition to Reporter's Notes, 1985

Amendment: Subsection (9) is added to Rule 2(a) to permit appeal to the Supreme Court of an order certifying a case as a class action under Rule 23, Ark. R. Civ. P. See *Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985). The Supreme Court has previously held that an order denying class certification is appealable under Rule 2. *Drew v. First Federal Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981). In contrast, neither type of order is immediately appealable in the federal courts. See *Coopers & Lybrand v. Livesay*, 437 U.S. 473 (1978); *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978).

Addition to Reporter's Notes, 1991

Amendment: Rule 2(a)(9) is amended to expressly permit an immediate appeal from any order denying a motion to certify a case as a class action, as well as from an order granting such certification. The Supreme Court has held that both types of orders may be immediately appealed. See *Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985); *Drew v. First Federal Savings & Loan Ass'n*, 271 Ark. 667, 610 S.W.2d 876 (1981). However, Rule 2(a)(9) has heretofore specifically dealt only with orders granting class certification. Rule 2(c) is amended to add appeals under Rule 2(a)(9) to the list of those that "take precedence," since appeals of orders granting or denying class certification are interlocutory in nature.

Addition to Reporter's Notes, 1999

Amendment: The Supreme Court added subdivisions (c) and (d) to Rule 2 in 1999 and redesignated former subdivision (c) as (e). Also, appeals under subdivisions (c)(3) and (d) were added to the list of civil cases that "take precedence" in the appellate court. These changes were recommended by an ad hoc committee on foster care and adoption. See *In re Rules of Appellate Procedure—Civil*, Rule 2, 336 Ark. Appx. (1999).

Addition to Reporter's Notes, 2000

Amendment: Three changes, all of which restate present law, have been made in Rule 2(a). New paragraph 10 provides that an immediate appeal lies from an order "denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity or the immunity of a government official." This provision is a codification of case law. See, e.g., *Ozarks Unlimited Resources Coop., Inc. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998); *Newton v. Ethoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

New paragraph 11 is a restatement of Rule 54(b) of the Arkansas Rules of Civil Procedure. Because noncompliance with Rule 54(b) continues to be a problem, this provision was added as a reminder to counsel. New paragraph 12 reflects the Supreme Court's holding that Rule 2(a) preserves all statutory rights of appeal in existence as of July 1, 1979, the effective date of the Rules of Appellate Procedure. *See Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994); *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994). The original Reporter's Note to Rule 2 contains a statement to that effect, but the Committee on Civil Practice deemed it desirable to include specific language in the text of the rule. Paragraph 12 also includes two examples of statutes that fall within its scope.

Addition to Reporter's Notes, [February] 2001 Amendment: Paragraph 11 of subdivision (a) has been amended to reflect the certificate now required by Rule 54(b) of the Rules of Civil Procedure.

Addition to Reporter's Notes, [June] 2001 Amendment: The reference to chancery and probate courts in the introductory clause of Rule 2(a) has been deleted in light of Constitutional Amendment 80, the new judicial article approved by the voters in November 2000. That amendment established the circuit courts as the state's "trial courts of original jurisdiction" and abolished the separate chancery and probate courts. For the same reason, the references to "trial court" in subdivisions (a)(1) and (a)(11) have been replaced with "circuit court."

The term "probate court" has been deleted from subdivision (a)(12) and the provision rewritten to refer to "probate cases." Similarly, the reference to "juvenile court" in the introductory sentence of subdivision (c) has been deleted and the sentence revised to refer to "juvenile cases." In subdivision (c)(2), the reference to "juvenile court" has been changed to "circuit court."

Addition to Reporter's Notes, 2003 Amendment: The second sentence of subdivision (b) is new. This sentence formerly appeared in Rule 5(b), which has been rewritten.

Addition to Reporter's Notes, 2010 Amendment: New subdivision (a)(13) has been added to reflect the common-law rule that some contempt orders are final and appealable. *Young v. Young*, 316 Ark. 456, 460, 872 S.W.2d 856, 858 (1994). For more than a century, Arkansas appellate courts reviewed these issues through certiorari because the statutes did not provide for the appeal of a contempt order. In 1985, the Arkansas Supreme Court recognized that "[o]ur cases have gradually reached the point at which in contempt cases there is no difference except in name between review by certiorari and re-

view by appeal." *Frolic Footwear, Inc. v. State*, 284 Ark. 487, 489-90, 683 S.W.2d 611, 612 (1985). The court therefore announced that henceforth it would review contempt orders by way of appeal rather than by writ. 284 Ark. at 490, 683 S.W.2d at 612.

Not all contempt orders, however, are final and thus appealable. For a contempt order to be final, it must completely dispose of the contempt matter between the appellant and the court. *Taylor v. Taylor*, 26 Ark. App. 31, 33, 759 S.W.2d 222, 223 (1988). A final contempt order also imposes sanctions. *Ibid.* Where an order does not impose any sanctions, the contempt has been remitted and no basis for appellate relief exists. *Ibid.* For example, an order indefinitely suspending contempt sanctions amounts to a complete remission of the contempt. *Warren v. Robinson*, 288 Ark. 249, 253, 704 S.W.2d 614, 616-17 (1986); *Stewart v. State*, 221 Ark. 496, 503, 254 S.W.2d 55, 59 (1953). When a contempt sanction is only partially suspended, however, the portion that was suspended is remitted, but the remaining portion of the contempt still exists and may be appealed. *Henry v. Eberhard*, 309 Ark. 336, 342, 832 S.W.2d 467, 470 (1992). Further, when a contempt sanction is suspended conditionally for a specific period of time, our supreme court has concluded that the suspension amounts to a postponement of the contempt rather than a remission. *Ibid.* An order with postponed sanctions is appealable. *Ibid.*

Addition to Reporter's Notes, 2012 Amendment: Arkansas Rules of Appellate Procedure-Civil 2(b) and 3(a) contained an ambiguity (same language in both rules) that could have been misconstrued as creating, under limited circumstances, a 180-day period in which to file the notice of appeal of a judgment (or intermediate order). Both rules stated that "[a]n appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from."

The reference in Rules 2(b) and 3(a) to orders disposing of postjudgment motions under Rule 4 (without designation of a specific subdivision under Rule 4) was intended to apply only to orders disposing of the postjudgment motions included in Rule 4(b)(1) (motions for judgment notwithstanding the verdict, motions to amend the court's findings of fact or to make additional findings, or any other motions to vacate, alter, or amend the judgment). However, the general reference to Rule 4 in Rules 2(b) and 3(a) could have been read as allowing appellate review of the original judgment (or intermediate order) "brought up for review" by an order disposing of any postjudgment motion

allowed under Rule 4. Since motions for extension of time to file a belated appeal are also included under Rule 4 (Rule 4(b)(3)), orders denying belated appeal motions could have been considered to bring up for review the original judgment (or intermediate order). Because belated appeal motions under Rule 4(b)(3) may be filed up to 180 days following the judgment, the effect would have been to create a 180-day period in which to appeal the original judgment (or intermediate order).

The amendment clarifies the original intent of Rules 2(b) and 3(a) by specifically limiting the postjudgment motions that bring up for review original judgments or intermediate orders to the postjudgment motions included in Rule 4(b)(1).

The addition of new paragraph (f) gives the Arkansas Supreme Court discretion to grant permission to take an interlocutory appeal of an order under Ark. R. Civ. P. 37 compelling production of materials or information or an order under Ark. R. Civ. P. 45 denying a motion to quash production of materials for which a privilege or opinion-work-product is claimed. In part the rule is modeled on the successful federal court discretionary interlocutory appeal procedures found in Title 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 23(f).

The availability of interlocutory appellate review of privilege and work product matters was previously restricted by statements in several Arkansas cases that interlocutory review will not be allowed “even when the alleged discovery violation pertains to material the petitioning party claims are privileged.” *Cooper Tire & Rubber Co. v. Phillips Cnty. Circuit Court*, 2011 Ark. 183, at 6, ____ S.W.3d ____; *Monticello Healthcare Center, LLC v. Goodman*, 2010 Ark. 339, at 18, ____ S.W.3d ____; *Baptist Health v. Circuit Court of Pulaski Cnty.*, 373 Ark. 455, 284 S.W.3d 499 (2008). The concern expressed by the court was that allowing interlocutory review could lead to its having to make piecemeal decisions whenever an application for discovery is unsuccessfully resisted at the trial court level. However, a privilege issue that arises within the context of a discovery request also implicates substantive rights that extend well beyond the scope of discovery concerns. See generally Sarah Blassingame Leflar, *Reviving the Privilege Doctrine: The Appealability of Orders Compelling the Production of Privileged Information*, 62 Ark. L. Rev. 283, 288 (2009). See also Jonathan P. Rich, Note, *The*

Attorney-Client Privilege in Congressional Investigations, 88 Colum. L. Rev. 145, 165 (1988). In addition, the Arkansas Supreme Court has recognized an exception to the general doctrine barring interlocutory appellate review of discovery matters where the issue is not merely the resolution of a discovery matter but involves another area of law that could be impacted by the resolution of the discovery matter. *Cooper Tire & Rubber Co. v. Phillips Cnty. Circuit Court*, 2011 Ark. 183, at 6. (*Cooper* involved an order to produce confidential trade secret information for which privilege protection is recognized under Rule 507 of the Arkansas Rules of Evidence.)

New subdivision (f)(1) recognizes that the integrity of certain relationships and information will be irretrievably compromised if appellate review of a privilege-contested order allowing discovery must wait until after the circuit court enters a final judgment. Belated vindication cannot re-cloak the disclosed information. The amendment establishes a mechanism by which the court can balance the interest of judicial efficiency and the values inherent in substantive-privilege law. The concern with allowing piecemeal interlocutory appeals of discovery matters is addressed by narrowly limiting the appeal process to privilege matters and by giving the court authority to allow an appeal only if in the court’s discretion the matter is worthy of further appellate consideration.

Subdivision (f)(1) establishes guidelines for the court’s decision whether to allow the appeal. To help ensure development of an adequate record for the Supreme Court’s consideration of whether to allow an appeal, the trial court is required to make factual findings and address the guideline factors (a) through (f) (see also corresponding Ark. R. Civ. P. 26 (f)). In contrast to the factual findings required under Ark. R. Civ. P. 54 (b), subdivision (f)(1) does not make the findings a requirement of the court’s jurisdiction on appeal (see Ark. R. Civ. P. 54 (b)(2)). The contents of the petition to allow an appeal and associated procedures are prescribed, in part, by subdivision (f)(2). The subdivision (f)(2) procedures allow the filing of a response but prohibit a reply or a petition for rehearing. Under subdivision (f)(3) appeal proceedings are not to delay trial or other lower-court proceedings unless ordered by the circuit court or the Supreme Court. The initial procedures to be followed if the court allows an appeal are also prescribed by subdivision (f)(3).

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Ford Motor Credit Co. v. Nesheim: Appealability of Class Orders in Arkansas, 40 Ark. L. Rev. 165.

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In General.

This rule preserved all statutory rights of appeal that were in existence at the effective date of the rules, July 1, 1979. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

This rule preserves the statutory rights of appeal which were in existence at the effective date of the appellate rules, including those granted under § 28-1-116. *In re Vesa*, 319 Ark. 574, 892 S.W.2d 491 (1995).

Construction.

The specific provision for appeal when an answer is stricken under subdivision (a)(4) of this rule must control over the general provisions contained in subdivision (a)(1) of this rule and ARCP 54(b). *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991).

The appealability of orders is governed by this rule and not by S. Ct. & Ct. App. Rule 1-2. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

Under Const. Amend. 58, which created the court of appeals, the Supreme Court, by rule, decides which court will have primary jurisdiction of appeals after an appeal has been validly lodged; S. Ct. & Ct. App. Rule 1-2 addresses that division of appellate jurisdiction and does not address the appealability of orders. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

Subdivision (a)(6) of this rule, providing for appeals from injunctions, represents an exception to ARCP 54(b), which requires that all claims relating to all parties be disposed of prefatory to appeal; the specific authority for an appeal from an injunction should control over the absence of finality in the court's order. *East Poinsett County Sch. Dist. No. 14 v. Massey*, 317 Ark. 219, 876 S.W.2d 573 (1994).

Subdivision (a)(4) of this rule, allowing an appeal from an order striking out an answer, or any part of an answer, or any pleading in an action, controls over ARCP 54(b), requiring that appeals be from final orders. *Allen v. Greenland*, 347 Ark. 465, 65 S.W.3d 424 (2002).

Purpose.

The purpose of this rule is to avoid piecemeal litigation. *Lamb v. JFM, Inc.*, 311 Ark. 89, 842 S.W.2d 10 (1992).

Applicability.

This Rule applies to appeals from the Workers' Compensation Commission. *Samuels Hide & Metal Co. v. Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987); *Hernandez v. Simmons Indus.*, 25 Ark. App. 25, 752 S.W.2d 45 (1988); *Banquet Foods v. McGlothlin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988); *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988); *Baldor Elec. Co. v. Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989).

The Rules of Appellate Procedure govern appeals from circuit, chancery, and probate courts; and were not intended to apply to appeals from state agencies. *Sunbelt Couriers v. McCartney*, 303 Ark. 522, 798 S.W.2d 92 (1990).

When the Supreme Court promulgated this rule, it did not intend to alter the statutory rights of appeal that were then in existence; for example, the Uniform Arbitration Act and its section on appeals, § 16-108-219, were enacted in 1969 and were in existence at the time this rule was promulgated, thus, a party would have a right of appeal, under this rule, from an order denying a motion to compel arbitration. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

Section 28-1-116 provides for appeals from probate causes involving wills, estates, and fiduciary relationships; it was enacted in 1949 and was in effect at the time this rule was adopted and, therefore, determines whether there is a right of appeal in a case involving orders of the probate court. *Pickens v. Black*, 316 Ark. 499, 872 S.W.2d 405 (1994).

Appealable Order.

An order disqualifying counsel is appealable. *Herron v. Jones*, 276 Ark. 493, 637 S.W.2d 569 (1982).

An order setting aside the judgment against a garnishee was appealable to the Supreme Court only because the appeal involved the interpretation or construction of § 16-58-125, which establishes the requirements for services of process upon a corporate agent at a branch office. *Morgan v. National Pizza Co.*, 285 Ark. 61, 684 S.W.2d 812 (1985).

The order of a trial court certifying a case as a class action under ARCP 23 was a final or appealable order as defined in this rule following the Supreme Court's amendment of this rule to permit an appeal from an order certifying a case as a class action. *Ford Motor Credit Co. v. Nesheim*, 285 Ark. 253, 686 S.W.2d 777 (1985); *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), cert. denied 509 U.S. 921, 113 S. Ct. 3034, 125 L. Ed 2d 721 (1993), overruled *Department of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996).

An appeal was properly taken from an interlocutory order compelling the appellants to comply with discovery of financial data

concerning a church, because if appellants complied with the discovery order and the trial court concluded after the trial that appellees were not entitled to the information they sought, appellants could not be placed in their former condition. *Gipson v. Brown*, 288 Ark. 422, 706 S.W.2d 369 (1986).

The order, which denied the appellant's motion to modify, set aside, and vacate the writ of mandamus, ordered that the sale of the property, under levy of execution, proceed; this order was within the ambit of this rule. *Smith v. Flash TV Sales & Serv., Inc.*, 17 Ark. App. 185, 706 S.W.2d 184 (1986).

An appeal from any final order also brings up for review any intermediate order involving the merits. *Hayden v. Hayden*, 291 Ark. 582, 726 S.W.2d 287 (1987).

For an order of a trial court to be appealable, it must be an order which in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action. *Associates Fin. Servs. Co. v. Crawford County Mem. Hosp.*, 297 Ark. 14, 759 S.W.2d 210 (1988).

Subdivision (a)(4) of this rule authorizes an appeal when an answer has been stricken, even if it is not a final judgment. *Arnold Fireworks Display, Inc. v. Schmidt*, 307 Ark. 316, 820 S.W.2d 444 (1991).

Order which recited that the chancery court lacked personal jurisdiction and that any petition for termination of parental rights would have to be filed in another state, decisively concluded the right to file for termination of parental rights in Arkansas and was, therefore, final and appealable. *Arkansas Dep't of Human Servs. v. Farris*, 309 Ark. 575, 832 S.W.2d 482 (1992).

The denial of an intervention of right based on a claimed interest in the litigation which may be unprotected constitutes an appealable order under subdivision (a)(2) of this rule. *Cupples Farms Partnership v. Forrest City Prod. Credit Ass'n*, 310 Ark. 597, 839 S.W.2d 187 (1992).

An order vacating a judgment within ninety days is not an appealable order because it is not a final order dismissing the parties from the action, but an order vacating a judgment after ninety days is an appealable order because it is the equivalent of an order in an independent action setting aside the judgment. *Lamb v. JFM, Inc.*, 311 Ark. 89, 842 S.W.2d 10 (1992).

An order granting or refusing a new trial is appealable. *Mikkelsen v. Willis*, 38 Ark. App. 33, 826 S.W.2d 830 (1992).

A decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under subdivision (a)(1) of this rule. When there is such an order, a certification under ARCP

54(b) is not necessary. *Alberty v. Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993).

An order dismissing a complaint with prejudice is a final and appealable order. *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

A decree foreclosing a mortgage and a later decree confirming the foreclosure sale were both final and appealable orders. *Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994).

A decree that orders a judicial sale of property and places the court's directive into execution is a final order and appealable under subdivision (a)(1) of this rule; when there is such an order, a certification under ARCP 54(b) is not necessary. *Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994).

For an order to be appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy; the order must be of such a nature as to not only decide the rights of the parties, but to put the court's directive into execution, ending the litigation or a separable part of it. *Doe v. Union Pac. R.R.*, 323 Ark. 237, 914 S.W.2d 312 (1996).

For an order to be appealable, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Petrus v. Nature Conservancy*, 330 Ark. 722, 957 S.W.2d 688 (1997).

Because the defendant government officials contended that they were immune from suit, as opposed to being immune solely from liability, the denial of their motion to dismiss on immunity grounds was an appealable order. *Heigle v. Miller*, 332 Ark. 315, 965 S.W.2d 116 (1998).

Although there is no need for the certification of a class in an action brought under ARCP Rule 23.2, where there was an apparent attempt on the part of the parties and the trial court to provide a notice under ARCP Rule 23, an order denying a motion to dismiss and overruling objections to the "class certification" would be deemed appealable. *Arkansas County Farm Bureau v. McKinney*, 334 Ark. 582, 976 S.W.2d 945 (1998).

Statute permitted an appeal from any order that was final as to the issue of custody, regardless of whether the order resolved all other issues. *Ford v. Ford*, 347 Ark. 485, 65 S.W.3d 432 (2002).

Where clinic and its insurer were completely dismissed from the lawsuit pursuant to the first summary-judgment order and the nonsuit as to the individual doctors excused them in the lawsuit, the order granting summary judgment was final and appealable after the voluntary nonsuit and, as the administrator did not file a notice of appeal within 30 days, the order granting summary judgment

could not be reviewed on appeal. *Winkler v. Bethell*, 362 Ark. 614, 210 S.W.3d 117 (2005).

Writ of certiorari was denied in a custody case because the Arkansas Department of Human Services (DHS) should have appealed the placement order under subdivision (c)(3)(A) of this rule, which states that an order resulting in the out of home placement of a child in a juvenile case was a final and appealable order; certiorari was not proper as the trial court clearly had the authority to make the placement decision. *Ark. Dep't of Human Servs. v. Circuit Court of Sebastian County*, 363 Ark. 389, 214 S.W.3d 856 (2005).

In a termination of parental rights proceeding, where the mother did not appeal from final orders in the adjudication hearing, review, and permanency-planning hearings, the appellate court was precluded from reviewing any adverse rulings from these portions of the record. *Causer v. Ark. Dep't of Human Servs.*, 93 Ark. App. 483, 220 S.W.3d 270 (2005).

Evidentiary rulings made during the trial were not intermediate orders where a mistrial occurred, it was equivalent to having no trial at all since was no final determination regarding claimant's cause of action; thus, the appellate court could not address any alleged errors that occurred during the trial. *Dodson v. Allstate Ins. Co.*, 365 Ark. 458, 231 S.W.3d 711 (2006).

Where the trial court failed to rule on a bank's motion to vacate documents related to the foreclosure sale of property because of a clerical error, the Supreme Court of Arkansas lacked jurisdiction to hear the bank's appeal until there was a final, appealable order, and the bank's motion did not fall within the "deemed denied" provision of Ark. R. App. P. Civ. 4(b)(1) because the appeal was not filed within 10 days the filing of the motion. *First Nat'l Bank v. Mayberry*, 366 Ark. 39, 233 S.W.3d 152 (2006).

Trial court retained jurisdiction of company's claims against appellees because, where some of the claims were resolved by nonsuit and some by summary judgment, there were no final appealable orders granting the appellate court jurisdiction. *Mountain Pure LLC v. Affiliated Foods Southwest, Inc.*, 366 Ark. 62, 233 S.W.3d 609 (2006).

Where sixteen-year-old appellant was charged with capital murder and residential burglary and tried as an adult, the Supreme Court of Arkansas could not consider his constitutional challenge to § 9-27-318(1), the juvenile-transfer statute, because there was no final, appealable order on the issue. *Barton v. State*, 366 Ark. 339, 235 S.W.3d 511 (2006).

Subdivision (c)(3)(A) of this rule provides specifically that adjudication orders from juvenile cases in which out-of-home placements are ordered are final and appealable orders, and the time within which to appeal an adju-

dication is not tolled by a motion for findings made pursuant to Ark. R. Civ. P. 52(a). Ark. Dep't of Human Servs. v. Dix, 94 Ark. App. 139, 227 S.W.3d 456 (2006).

Under subdivision (a)(1) of this rule, landowners' appeal of the circuit court's order finding that the neighbors had a prescriptive easement over their property was dismissed as the order did not identify the property awarded to the neighbors; case law required the circuit court decree to fix and describe the boundary lines in a dispute between landowners. *Penland v. Johnston*, 97 Ark. App. 11, 242 S.W.3d 635 (2006).

Circuit court's order concluding that the husband and wife had acquired the property from the individual by virtue of acquiescence was not a final, appealable order under subdivisions (a)(1) and (2) of this rule where the order did not include a legal description of the property because the husband and wife had failed to submit such a description. *Myers v. Yingling*, 369 Ark. 87, 251 S.W.3d 287 (2007).

Reviewing court was without jurisdiction to review the appeal because the notice of appeal was not properly and timely filed within thirty (30) days of the "order appealed from," and a review of case law revealed no instance where a reviewing court had ever dismissed a case for a lack of a final order without the notice of appeal and record having been timely filed; whether an order had properly been appealed pursuant to Ark. R. Civ. P. 54(b) was a jurisdictional question, which the reviewing court could address *sua sponte*, however, such a determination for this rule purposes was always secondary to whether a timely notice of appeal and record had been filed. *Sloan v. Ark. Rural Med. Prac. Loan & Scholarship Bd.*, 369 Ark. 442, 255 S.W.3d 834 (2007).

In a dispute among a hotel, a hotel management corporation, and various other corporations, an order to inspect was an appealable order because it was treated the same as a restraining order. *IBAC Corp. v. Becker*, 371 Ark. 330, 265 S.W.3d 755 (2007).

Appellate court overruled the credit card customer's assertion that the appellate court had no jurisdiction to review the denial of the bank's petition and application to confirm the arbitration award against the customer, because the bank was appealing from the denial of its petition to confirm the arbitration award, not from the denial of its motion for summary judgment. *MBNA Am. Bank, N.A. v. Blanks*, 100 Ark. App. 8, 262 S.W.3d 618 (2007).

Guardian's motion to dismiss an appeal brought by the estate and two co-administrators was denied where the order compelling arbitration included findings regarding probate matters, and thus, was appealable under

subdivision (a)(12) of this rule. *Carmody v. Raymond James Fin. Servs.*, 373 Ark. 79, 281 S.W.3d 721 (2008).

Where a divorce decree ordered the sale of the parties' real property at a public auction, the trial court entered an order setting aside the sale of six tracts to the husband; it was a final order and appealable under subdivision (a)(1) of this rule. *Nordin v. Nordin*, 2009 Ark. App. 567, — S.W.3d —, 2009 Ark. App. LEXIS 746 (2009).

Although not specifically enumerated in § 28-1-104, an appellate court had jurisdiction over a request to exhume a body because the decedent's personal representative petitioned the probate division of the circuit court, during administration of the decedent's estate, to enforce a provision in the decedent's will by ordering exhumation and reburial and probate orders were appealable pursuant to § 28-1-116(a) and subdivision (a)(12) of this rule. *Long v. Alford*, 2010 Ark. App. 233, — S.W.3d —, 2010 Ark. App. LEXIS 233 (Mar. 10, 2010).

Former attorney's appeal from a probate court's order striking the former attorney's response to a motion for modification and declaratory judgment and discovery requests was dismissed with prejudice because (1) the order striking the response was the only issue raised on appeal, (2) the order striking the response was an appealable order, under subdivision (a)(4) of this rule, (3) the order striking the response was not reviewable under § 28-1-116(d) as being an appealable order entered prior to a final order of distribution, as no final order of distribution meeting the requirements of § 28-53-104 was entered, (4) even if the contested order were viewed as an order of a probate court, rather than an order striking a response, the appeal was still untimely, as the order was appealable at the interlocutory stage, under subdivision (a)(12) of this rule and § 28-1-116, and (5) the appeal was not timely filed under Ark. R. App. P. Civ. 4(a). *Brown v. Wilson* (In re Estate of Stinnett), 2011 Ark. 278, — S.W.3d —, 2011 Ark. LEXIS 251 (June 23, 2011).

Order striking part of appellants' answer in a wrongful death action as a sanction for discovery violations was appealable under subdivision (a)(4) of this rule. *Lake Vill. Healthcare Ctr., LLC v. Hatchett*, 2012 Ark. 223, — S.W.3d —, 2012 Ark. LEXIS 254 (May 24, 2012).

—Determination.

The test of finality and appealability of an order is not whether the order settles the issue as a question of law, but to be final the order must also put the court's directive into execution, ending the litigation or a separable branch of it. *Scaff v. Scaff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982).

For a chancellor's order to be appealable, it

must in some way determine or discontinue the action; the final order must put the chancellor's directive into execution, ending the litigation or at least a separable portion of it. *Morgan v. Morgan*, 8 Ark. App. 346, 652 S.W.2d 57 (1983).

The test of the finality and appealability of an order is not whether the order settles the issue as a question of law, but whether it also puts the court's directive into execution, ending the litigation or a separable branch of it; an order is appealable if it would divest a substantial right in such a way as to put it beyond the power of the court to place the party in the party's former condition. *Smith v. Flash TV Sales & Serv., Inc.*, 17 Ark. App. 185, 706 S.W.2d 184 (1986).

Even though the parties do not raise the issue of the appealability of an order, it is the duty of the appellate court to determine whether or not it has jurisdiction. *Associates Fin. Servs. Co. v. Crawford County Mem. Hosp.*, 297 Ark. 14, 759 S.W.2d 210 (1988).

In a child custody modification action, although the trial court's nunc pro tunc order did not fix the amount of the mother's child support payments, but instead directed the mother to produce pay stubs so that the amount could be determined in the future, the trial court's order changed custody from joint custody in both parents to sole custody in the father and was final for purposes of an appeal under subsection (d) of this rule. *Lewellyn v. Lewellyn*, 351 Ark. 346, 93 S.W.3d 681 (2002).

Appeal and cross appeal from the divorce decree entered by the trial court was dismissed for lack of appellate jurisdiction because there was no final appealable order, as required by subdivision (a)(1) of this rule and Ark. R. Civ. P. 54, where the trial court held in abeyance its final decision regarding the division of the parties' home and personal property. *Farrell v. Farrell*, 359 Ark. 1, 193 S.W.3d 734 (2004).

Order refusing to vacate an arbitration award was tantamount to an order confirming an arbitration award and was therefore appealable under § 16-108-219(a)(3). *ESI Group, Inc. v. Brown*, 90 Ark. App. 6, 203 S.W.3d 664 (2005).

Postjudgment order was appealable because appellants were not contesting the judgments themselves; rather, they were challenging a circuit court's postjudgment order finding that payment of the awards under the judgments did not satisfy the judgments. Thus, the order was appealable because it, in effect, determined the action of the case. *Ark. HHS v. Storey*, 372 Ark. 23, 269 S.W.3d 803 (2007).

A mother's appeal from an order in a dependency-neglect case granting permanent custody of her children to their father was an appeal from a final, appealable order under

subsection (d) of this rule because subsection (d) applied to permanent custody orders in dependency-neglect cases, and, thus, there was no direct conflict with Ark. Sup. Ct. & Ct. App. R. 6-9, as (1) Rule 6-9 did not state that permanent custody orders were not final, appealable orders or that an Ark. R. Civ. P. 54(b) certificate was necessary for a permanent custody order relative to one child to be appealable, (2) subsection (d) specifically stated that custody orders were final, appealable orders; and (3) a Rule 54(b) certificate was not required under Rule 6-9 for an appeal of the order regarding the two children in question. *West v. Ark. Dep't of Human Servs.*, 373 Ark. 100, 281 S.W.3d 733 (2008).

If an order was appealable under subsection (a) of this rule, it had to be appealed within the thirty days after entry of the order as prescribed by Ark. R. App. P. Civ. 4(a), and the determination of whether an order was appealable under this rule was always secondary to the determination of whether the appeal was timely under Ark. R. App. P. Civ. 4, so a reviewing court would first look to Ark. R. App. P. Civ. 4 to determine timeliness of a notice of appeal and then to this rule to determine if the order appealed from was an appealable order because (1) this rule governed which orders were appealable, while Ark. R. App. P. Civ. 4 governed when those orders had to be appealed, and (2) Ark. R. App. P. Civ. 4 used the word "shall," which was usually interpreted as mandatory, while this rule used the word "may," which was usually interpreted as discretionary, so, if an appeal "may" be taken under subsection (a) of this rule, it "shall" still be taken within thirty days from entry of that order under Ark. R. App. P. Civ. 4(a). *Brown v. Wilson* (In re Estate of Stinnett), 2011 Ark. 278, — S.W.3d —, 2011 Ark. LEXIS 251 (June 23, 2011).

—Foreclosure.

A decree granting foreclosure is a separate, final, and appealable order, and a notice of appeal must be taken within 30 days from the date that order is entered. *McAdams v. Automotive Rentals, Inc.*, 319 Ark. 254, 891 S.W.2d 52, cert. denied 516 U.S. 844, 116 S. Ct. 132, 133 L. Ed. 2d 80 (1995).

—Scope of Review.

In deciding an appeal when an answer has been stricken, the Supreme Court should rule on all the issues dependent upon the stricken answer; conversely, the court need only to address those matters that are related to the striking of the answer. *Arnold & Arnold v. Williams*, 315 Ark. 632, 870 S.W.2d 365, cert. denied 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 400 (1994).

Because a mother failed to file a timely notice of appeal from the trial court's adjudication order, the appellate court was unable

to consider the mother's arguments relating to errors made during the adjudication hearing; however, the appellate court did consider whether the trial court's failure to provide counsel for the mother, pursuant to § 9-27-316, during the adjudication hearing tainted the remainder of the case, which resulted in termination of parental rights, and found no such taint. *Jefferson v. Ark. Dep't of Human Servs.*, 356 Ark. 647, 158 S.W.3d 129 (2004).

Parents in a termination proceeding failed to appeal the trial court's adjudication order which was an appealable order, therefore, the appellate court could not consider arguments relating to alleged errors made during the adjudication hearing. *Neves da Rocha v. Ark. Dep't of Human Servs.*, 93 Ark. App. 386, 219 S.W.3d 660 (2005).

Attachment or Garnishment.

Under subdivision (a)(5) of this rule, there must be an order vacating or sustaining a garnishment; an order denying a motion for summary judgment is not appealable under this rule. *Medical & Dental Credit Bureau, Inc. v. Lake Hamilton Camp & Conference Grounds*, 291 Ark. 353, 727 S.W.2d 382 (1987).

Briefs.

Rebriefing was needed in the event that the appeal was pursued, because several items were missing, and it appeared that the counterclaims and related orders were not in either the record or the addendum; it was strongly recommended that the parties review their arguments and addendum to determine whether the addendum should be supplemented with any other pleadings or documents to support its arguments on appeal. *Jenkins v. APS Ins., LLC*, 2012 Ark. App. 368, — S.W.3d —, 2012 Ark. App. LEXIS 486 (May 30, 2012).

Class Actions.

Issues may not be presented, under the guise of an appeal of a class certification, other than those issues concerning compliance with ARCP 23. *Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14*, 298 Ark. 603, 769 S.W.2d 419 (1989).

Where the appellant appealed from class certification but raised only issues of sovereign immunity and standing to sue, the appeal was dismissed because issues were not proper ones to be raised pursuant to subsection (a) of this rule. *Arkansas State Bd. of Educ. v. Magnolia Sch. Dist. No. 14*, 298 Ark. 603, 769 S.W.2d 419 (1989).

Appeal by city from a class certification order in an illegal exaction case was not a proper basis for an interlocutory appeal under subdivision (a)(9) of this rule; the taxpayers were already a class under Ark. Const., Art. 16, § 13. *City of W. Helena v. Sullivan*, 353 Ark. 420, 108 S.W.3d 615 (2003).

Circuit court erred when it determined that a claim of an illegal tying arrangement based on an alleged forced purchase by a franchisee could not have fallen under state statutes; federal jurisdiction was not exclusive in these matters under the Sherman Act, 15 U.S.C.S. § 1 et seq., moreover, a finding that a state claim could not have prevailed or that defenses existed was improper at the class certification stage because the only permissible inquiry was whether the elements of this rule had been satisfied. *Carquest of Hot Springs, Inc. v. General Parts, Inc.*, 367 Ark. 218, 238 S.W.3d 916 (2006).

Arkansas Supreme Court's jurisdiction was proper pursuant to Ark. Sup. Ct. & Ct. App. R. 1-2(a)(8), because the appeal for the order certifying the class was an interlocutory appeal pursuant to subdivision (a)(9) of this rule. *FirstPlus Home Loan Owner 1997-1 v. Bryant*, 372 Ark. 466, 277 S.W.3d 576 (2008).

Contempt.

While a finding of a contempt is appealable because it constitutes a final disposition of the contempt matter as between the appellant and the court, where no sanctions are imposed, and there is not merely a postponement of a sanction but a complete remission of the contempt, there is no basis for appellate relief on the contempt issue. *Taylor v. Taylor*, 26 Ark. App. 31, 759 S.W.2d 222 (1988).

An order of contempt is a final, appealable order. *Young v. Young*, 316 Ark. 456, 872 S.W.2d 856 (1994).

Custody.

In a child custody case, even though the matter of visitation was left open, a custody determination was nonetheless final under subsection (d) of this rule. *Pfeifer v. Deal*, 2012 Ark. App. 190, — S.W.3d —, 2012 Ark. App. LEXIS 290 (Feb. 29, 2012).

Denial of Default Judgment.

The trial judge's order denying a motion for default judgment and providing that the case should proceed to trial on its merits, was not appealable since such ruling did not "dismiss the parties from the Court, discharge them from the action or conclude their rights to the subject matter in controversy." *DeClerk v. Tribble*, 269 Ark. 572, 599 S.W.2d 152 (1980).

An order setting aside a default judgment, which ordinarily is not appealable because it is not final, becomes appealable when it is entered more than 90 days after the entry of the default judgment. *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988).

Refusal to set aside a default judgment as to liability is not a final judgment as required for appeal. The issue of damages remains to be tried before there can be a final order. *Sevenprop Assocs. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988).

The denial of a motion for a default judg-

ment is not a final order. *Associates Fin. Servs. Co. v. Crawford County Mem. Hosp.*, 297 Ark. 14, 759 S.W.2d 210 (1988).

Denial of Motion to Dismiss.

The denial of a motion to dismiss an action is not a final judgment from which an appeal may be taken; the only matter disposed of by the order is that the case should proceed to trial, and those matters put in issue are not lost by continuing through a trial of the matter. *Epperson v. Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988).

In a case in which the trial court's order certifying a suit as a class action was reversed on appeal, the trial court's denial of defendant's motion to dismiss plaintiff's suit pursuant to ARCP 12(b)(6) was not an appealable order under this rule. *Lenders Title Co. v. Chandler*, 353 Ark. 339, 107 S.W.3d 157 (2003).

Denial of Motion to Intervene.

Foster parents' appeal from the denial of their motion to intervene in a dependency-neglect proceeding was a final order governed by subdivision (a)(2) of this rule, not Ark. Sup. Ct. R. 6-9. Therefore, the foster parents' failure to sign the notice of appeal was not a fatal defect, and their appeal was not subject to dismissal. *Schubert v. Ark. Dep't of Human Servs.*, 2009 Ark. 596, 357 S.W.3d 458 (2009).

Denial of Summary Judgment.

A denial of a summary judgment is deemed an interlocutory order and not a final order from which appeal may be taken. *Danco Constr. Co. v. City of Fort Smith*, 268 Ark. 1053, 598 S.W.2d 437 (1980); *Medical & Dental Credit Bureau, Inc. v. Lake Hamilton Camp & Conference Grounds*, 291 Ark. 353, 727 S.W.2d 382 (1987).

Denial of a summary judgment motion is not a final, appealable order. *Jaggers v. Zolliecoffer*, 290 Ark. 250, 718 S.W.2d 441 (1986); *Malone & Hyde, Inc. v. West & Co.*, 300 Ark. 435, 780 S.W.2d 13 (1989); *Sutter v. King*, 310 Ark. 681, 839 S.W.2d 218 (1992).

Generally a denial of a motion for summary judgment is a nonappealable order. However, the general rule does not apply in cases where, under subdivision (a)(2) of this rule, the refusal to grant the summary judgment motion has the effect of determining that the appellants are not entitled to immunity from suit, as the right of qualified immunity from suit is effectively lost if a case is permitted to go to trial. *Robinson v. Beaumont*, 291 Ark. 477, 725 S.W.2d 839 (1987).

Disqualification.

Subdivision (a)(8) of this rule had its genesis in a 1982 case where a motion was made by one party to disqualify counsel of the opposing party for violation of the Code of

Professional Responsibility. *Price v. State*, 313 Ark. 96, 852 S.W.2d 107 (1993).

Where the trial judge, on his own motion, simply removed court-appointed counsel for purposes of the appeal, leaving the public defender to represent defendant, the removal was not a disqualification initially raised by opposing counsel on ethical grounds under subdivision (a)(8) of this rule and, hence, did not constitute an appealable order under this rule. *Price v. State*, 313 Ark. 96, 852 S.W.2d 107 (1993).

"Disqualify" is defined as "to divest or deprive of qualification; to incapacitate" or "to render ineligible or unfit." *Brenk v. State*, 316 Ark. 249, 871 S.W.2d 372 (1994).

Where one of two court appointed attorneys was removed from representing defendant in his second trial for murder, but the attorney was not disqualified from further participation, was not prohibited from participating, and in fact was specifically granted permission to continue to participate in defendant's retrial at his own expense, the order of removal was not an order of disqualification under subdivision (a)(8) of this rule. *Brenk v. State*, 316 Ark. 249, 871 S.W.2d 372 (1994).

An order denying a motion to disqualify adversary's counsel in a civil proceeding is not an appealable final order. *Clark v. Clark*, 319 Ark. 193, 890 S.W.2d 267 (1995).

Finality of Judgment.

In order for a judgment to be final, it must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Roy v. International Multifoods Corp.*, 268 Ark. 958, 597 S.W.2d 129 (1980); *Hyatt v. City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982); *McIlroy Bank & Trust v. Zuber*, 275 Ark. 345, 629 S.W.2d 304 (1982); *Roberts Enters., Inc. v. Arkansas State Hwy. Comm'n*, 277 Ark. 25, 638 S.W.2d 675 (1982); *Corning Bank v. Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984); *Fratesi v. Bond*, 282 Ark. 213, 666 S.W.2d 712 (1984); *Tapp v. Fowler*, 288 Ark. 70, 702 S.W.2d 17 (1986); *Epperson v. Biggs*, 17 Ark. App. 212, 705 S.W.2d 901 (1986); *Elardo v. Taylor*, 291 Ark. 503, 726 S.W.2d 1 (1987); *Samuels Hide & Metal Co. v. Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *Sevenprop Assocs. v. Harrison*, 295 Ark. 35, 746 S.W.2d 51 (1988); *Hernandez v. Simmons Indus.*, 25 Ark. App. 25, 752 S.W.2d 45 (1988); *Estate of Hastings v. Planters & Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1988); *Wilburn v. Keenan Cos.*, 297 Ark. 74, 759 S.W.2d 554 (1988); *Taylor v. Taylor*, 26 Ark. App. 31, 759 S.W.2d 222 (1988); *Banquet Foods v. McGlothlin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988); *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988);

Malone & Hyde, Inc. v. West & Co., 300 Ark. 435, 780 S.W.2d 13 (1989); Arkansas Dep't of Human Servs. v. Lopez, 302 Ark. 154, 787 S.W.2d 686 (1990); Arkansas Dep't of Human Servs. v. Farris, 309 Ark. 575, 832 S.W.2d 482 (1992); Kelly v. Kelly, 310 Ark. 244, 835 S.W.2d 869 (1992).

Where a circuit judge issued an order which denied the defendant's motions to declare a settlement and to dismiss the action, such an order was not a "final judgment" from which an appeal would lie under this rule. Roy v. International Multifoods Corp., 268 Ark. 958, 597 S.W.2d 129 (1980); Hyatt v. City of Bentonville, 275 Ark. 210, 628 S.W.2d 326 (1982).

The denial of a motion to dismiss an action is not a final judgment from which an appeal will lie. Roberts Enters., Inc. v. Arkansas State Hwy. Comm'n, 277 Ark. 25, 638 S.W.2d 675 (1982).

The Supreme Court will not reach the merits of an appeal if the order appealed is not final. Corning Bank v. Delta Rice Mills, Inc., 281 Ark. 342, 663 S.W.2d 737 (1984); Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984); Kilgore v. Viner, 293 Ark. 187, 736 S.W.2d 1 (1987); Sevenprop Assocs. v. Harrison, 295 Ark. 35, 746 S.W.2d 51 (1988); Wilburn v. Keenan Cos., 297 Ark. 74, 759 S.W.2d 554 (1988).

The rule that an order must be final to be appealable is a jurisdictional requirement which the court is obliged to raise even when the parties do not. Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984); Mid-State Homes, Inc. v. Beverly, 20 Ark. App. 213, 727 S.W.2d 142 (1987); Wilburn v. Keenan Cos., 297 Ark. 74, 759 S.W.2d 554 (1988).

Where the trial court did not grant summary judgment in the whole case but merely on the issue of punitive damages, such judgment was not final and appealable. Fratesi v. Bond, 282 Ark. 213, 666 S.W.2d 712 (1984).

To be final, an order must be of such a nature as to not only decide the rights of the parties, but also to put the court's directive into execution, ending the litigation or a separable part of it. Kilgore v. Viner, 293 Ark. 187, 736 S.W.2d 1 (1987); Bonner v. Sikes, 20 Ark. App. 209, 727 S.W.2d 144 (1987); Mid-State Homes, Inc. v. Beverly, 20 Ark. App. 213, 727 S.W.2d 142 (1987); Harper v. Harper, 21 Ark. App. 255, 731 S.W.2d 241 (1987).

A judgment is the final determination of the rights of parties in an action; the amount of the judgment must be computed, as near as may be, in dollars and cents; and the judgment must specify clearly the relief granted or other determination of the action. A final judgment or decision is one that finally adjudicated the rights of the parties, putting it beyond the power of the court which made it to place the parties in their original positions;

it must be such a final determination as may be enforced by execution or in some other appropriate manner. Estate of Hastings v. Planters & Stockmen Bank, 296 Ark. 409, 757 S.W.2d 546 (1988).

Before an order for a judicial sale places the court's directive into execution, the chancellor must appoint a commissioner and set a day and place for the sale, and, perhaps, set an attorney's fee. Alberty v. Wideman, 312 Ark. 434, 850 S.W.2d 314 (1993).

A chancellor's ruling, which provided for alternative resolutions of the dispute, was final for purposes of appeal, since it addressed every issue presented by the parties, and reserved no issues for later determination. Chambers v. Manning, 315 Ark. 369, 868 S.W.2d 64 (1993).

Where the chancellor failed to appropriately treat two counterclaims, as well as a cross-complaint, the appeal was dismissed as not final, pursuant to ARCP 54(b) and subdivision (a)(2) of this rule. Maroney v. City of Malvern, 317 Ark. 177, 876 S.W.2d 585 (1994).

Although the ruling on a motion treated as one to intervene came after the final judgment, it was a part of the litigation which resulted in that final determination and was a part of the judgment; thus, it was final and appealable pursuant to subdivision (a)(1) of this rule. Arkansas Best Corp. v. General Elec. Capital Corp., 317 Ark. 238, 878 S.W.2d 708 (1994).

Even though an issue on which a court renders a decision might be an important one, an appeal will be premature if the decision does not, from a practical standpoint, conclude the merits of the case. Doe v. Union Pac. R.R., 323 Ark. 237, 914 S.W.2d 312 (1996).

Where the trial court did not give a directive that a final judgment be entered but only granted partial summary judgment, the judgment lacked finality and thus was not appealable. French v. Brooks Sports Ctr., Inc., 57 Ark. App. 30, 940 S.W.2d 507 (1997).

An order in a divorce proceeding that required the parties to cooperate in procedures to determine the paternity of the wife's child and that further required the husband to pay child support pending such determination was not a final order in that it left open the issue of the child's paternity, notwithstanding that both parties orally stated that the husband was the child's father. Smith v. Smith, 337 Ark. 583, 990 S.W.2d 550 (1999).

An order awarding costs did not constitute a final order within the meaning of subdivisions (a)(1) or (2) of this rule. Warren v. Kelso, 339 Ark. 70, 3 S.W.3d 302 (1999).

In an action seeking an equitable one-half interest in certain real property and requesting an order directing partition of the real property and a division of proceeds between

the parties, a decree finding that the real property was the property of a partnership between the parties and finding that the plaintiff was entitled to a credit should the property ever be sold was not a final appealable order as it failed to grant or deny the requested relief of partition. *Rigsby v. Rigsby*, 340 Ark. 544, 11 S.W.3d 551 (2000).

Where a plaintiff has exercised his absolute right to voluntarily dismiss his claim, the first dismissal is without prejudice and is not an adjudication on the merits. *Beverly Enterprises-Arkansas, Inc. v. Hillier*, 341 Ark. 1, 14 S.W.3d 487 (2000).

An order granting summary judgment was a final order for purposes of appeal, notwithstanding that the order also awarded attorney's fees, but did not set an amount and required the movant to submit an affidavit of attorney's fees along with a proposed precedent on the issue of attorney's fees to the court within seven days. *Harold Ives Trucking Co. v. Pro Transp., Inc.*, 341 Ark. 735, 19 S.W.3d 600 (2000).

A decree of divorce was not a final appealable order where it did not conclude the parties' property rights in respect to a number of issues, dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Roberts v. Roberts*, 70 Ark. App. 94, 14 S.W.3d 529 (2000).

Orders which terminated parental rights and denied an adoption petition were final appealable orders; however, an order which delayed a decision on future visitation with the prospective adoptive parents was part of an ongoing dependency/neglect case and, as such, was not ripe for appeal. *Larscheid v. Arkansas Dep't of Human Servs.*, 343 Ark. 580, 36 S.W.3d 308 (2001).

Arkansas Supreme Court held that, for an order to be final, it had to establish the amount of damages and, to the extent *Hartwick v. Hill*, 73 S.W. 3d 15 (2002) held to the contrary, it was overruled. *Villines v. Harris*, 362 Ark. 393, 208 S.W.3d 763 (2005).

Where trial court's order granted father temporary custody of the parties' child, but clearly provided that the issue of custody had not been resolved on the merits, mother's appeal from that order had to be dismissed for want of jurisdiction because the trial court's order was not a final judgment under subsection (d) of this rule. *Gilbert v. Moore*, 364 Ark. 127, 216 S.W.3d 583 (2005).

In an action by the parents of a deceased minor for wrongful death and survival, where the circuit court dismissed the wrongful death claim as time-barred but had not disposed of the survival action, the Supreme Court of Arkansas had no jurisdiction to hear an ap-

peal as there was no final judgment. *Myers v. McAdams*, 366 Ark. 435, 236 S.W.3d 504 (2006).

Mother's appeal from a ruling that, in part, awarded custody of the children to the father was improper pursuant to Ark. R. App. P. Civ. 4(a) since the mother failed to properly invoke the court's jurisdiction by filing a timely notice of appeal; the mother could have appealed directly from the July 7 order under this rule because it was final as to the award of custody, but her notice of appeal, filed more than 30 days after the order changing custody, was untimely as to that order. *Perez v. Furrow*, 95 Ark. App. 333, 237 S.W.3d 109 (2006).

When a trial court granted a permissive intervention, the intervenors could not appeal the decision because they had a method of intervention and the judgment was not final. *Duffield v. Benton County Stone Co.*, 369 Ark. 314, 254 S.W.3d 726 (2006).

Pursuant to subdivision (a)(1) of this rule, an appeal could be taken only from a final judgment or decree entered by the trial court, pursuant to Ark. R. Civ. P. 54(b), due to the lack of a final order, the insurer's appeal was dismissed as the trial court never ruled upon appellees' counterclaim. *S. Farm Bureau Cas. Ins. Co. v. Easter*, 369 Ark. 101, 251 S.W.3d 251 (2007).

Appeal in a contract dispute was dismissed because a counterclaim was not considered by a trial court; therefore, there was not a final judgment under subdivision (a)(1) of this rule and Ark. R. Civ. P. 54(b). *Hanners v. Giant Oil Co. of Ark., Inc.*, 369 Ark. 226, 253 S.W.3d 424 (2007).

Pursuant to this rule, the husband's appeal of the divorce decree ruling that certain funds were marital property was dismissed because the issue was still subject to pending litigation and was not a final judgment. *Hernandez v. Hernandez*, 371 Ark. 323, 265 S.W.3d 746 (2007).

Trial court's judgment disposing of the parties' claims and counterclaims in an action for tortious interference with a contract constituted a final, appealable order; the parties were in the same positions in which they would have been had defendants been sued separately. *Advanced Envtl. Recycling Techs. v. Advanced Control Solutions, Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008).

In a bank's foreclosure action, the homeowner's appeal was dismissed as the circuit court's order was not a final, appealable order under Ark. R. Civ. P. 41(a) where the written order did not reflect the circuit court's disposition of the homeowner's voluntarily non-suited counterclaims against the bank. *Bevans v. Deutsche Bank Nat'l Trust Co.*, 373 Ark. 105, 281 S.W.3d 740 (2008).

Appellate court could not hear the wife's appeal because there was no final order; the

trial court did not dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. *Young v. Young*, 2009 Ark. App. 556, — S.W.3d —, 2009 Ark. App. LEXIS 697 (2009).

Biological father's appeal from a trial court's order that denied his motion to dismiss an annulment between a husband and a wife based on lack of subject matter jurisdiction to award custody and visitation rights was not a final order under this rule, nor was it properly certified under Ark. R. Civ. P. 54(b). Thus, his appeal was dismissed. *Rees v. McLaughlin*, 2010 Ark. App. 617, — S.W.3d —, 2010 Ark. App. LEXIS 651 (Sept. 22, 2010).

Home seller's appeal of an order awarding judgment to a buyer on a claim of breach of the implied warranty of habitability was dismissed for lack of jurisdiction under subdivision (a)(1) of this rule because the record did not reflect an Ark. R. Civ. P. 54(b) certificate; it was not apparent that there was a final order disposing of the buyer's claim against the seller. *Progressive Southeast Ark. Hous. Dev. Corp. v. Abraham*, 2010 Ark. App. 760, — S.W.3d —, 2010 Ark. App. LEXIS 798 (Nov. 10, 2010).

Lienholder's appeal of an order holding that its lien was second in priority to a mortgagee's lien was dismissed for lack of a final order under subdivision (a)(1) of this rule because an intervenor's complaint and any relevant pleadings were not included in the record, making it impossible to determine if all the claims and parties pertaining to that complaint were settled. *Crafton, Tull, Sparks & Assocs. v. Ruskin Heights, LLC*, 2012 Ark. 56, — S.W.3d —, 2012 Ark. LEXIS 65 (Feb. 9, 2012).

Dismissal of a school district's appeal from a circuit court order granting a motion to dismiss was required because the order was not a final, appealable order. *Deer/Mt. Judea Sch. Dist. v. Beebe*, 2012 Ark. 93, — S.W.3d —, 2012 Ark. LEXIS 113 (Mar. 1, 2012).

As there was a contingency in a trial court order related to the repair work that was to be completed by appellees, arising from the parties' remodeling agreement, such that the issue of damages was not yet fully decided, the order was not a final appealable one under this rule. *Delancey v. Qualls*, 2012 Ark. App. 328, — S.W.3d —, 2012 Ark. App. LEXIS 443 (May 9, 2012).

Judgment and orders being challenged were not final, because the company's claims against the former associate were never adjudicated, and the judgment appealed from lacked finality since it did not address the company's claims for equitable relief, i.e., accounting and imposition of a constructive trust or equitable lien. *Jenkins v. APS Ins.,*

LLC, 2012 Ark. App. 368, — S.W.3d —, 2012 Ark. App. LEXIS 486 (May 30, 2012).

Interlocutory Decisions.

Interlocutory decisions and decisions on incidental matters are not reviewable for lack of finality. *Banquet Foods v. McGlothlin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988); *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988).

Interlocutory court order was intended to aid in determining issues raised in the complaint, was not an injunction, and was not appealable under subdivision (a)(6) of this rule. *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989).

The fact that a significant issue may be involved is not sufficient, in itself, for the appellate court to accept jurisdiction of an interlocutory appeal. *Scheland v. Childres*, 313 Ark. 165, 852 S.W.2d 791 (1993).

Since counsel stated during oral argument before the Supreme Court that he pursued appeal because the issues he sought to present were decided adversely to his clients, the appeal was interlocutory, which the Supreme Court had no authority to hear. *Haile v. Arkansas Power & Light Co.*, 322 Ark. 29, 907 S.W.2d 122 (1995).

The appointment of a receiver is a significant step and can affect the substantial rights of the parties. Review of the propriety of such an appointment is provided by permitting interlocutory appeals of such orders. *Boeckmann v. Mitchell*, 322 Ark. 198, 909 S.W.2d 308 (1995).

A stay order is not the equivalent of an injunction for purposes of subdivision (a)(6) of this rule. *Arkansas Dep't of Human Servs., Div. of Child Care & Early Childhood Educ. v. Hudson*, 338 Ark. 123, 991 S.W.2d 605 (1999), appeal dismissed 994 S.W.2d 488 (Ark. 1999).

An order that stayed the appellant agency's decision to revoke a child-care license was not an injunction within the meaning of subdivision (a)(6) of this rule because it did not finally determine any of the issues presented in the appeal of the license holder. *Arkansas Dep't of Human Servs. v. Hudson*, 338 Ark. 442, 994 S.W.2d 488 (1999).

A stay of proceedings does not constitute an injunction within the meaning of subdivision (a)(6) of this rule. *Warren v. Kelso*, 339 Ark. 70, 3 S.W.3d 302 (1999).

The Arkansas Supreme Court may exercise its appellate jurisdiction over an interlocutory order by which an injunction is granted, pursuant to subdivision (a)(6) of this rule; the rule providing for appeals from injunctions is an exception to the general rule that appeals may be taken only from a final judgment or decree. *Villines v. Harris*, 340 Ark. 319, 11 S.W.3d 516 (2000).

An order fixing venue is not a final order under the rule, rather, it is an intermediate

order encompassed by subsection (b) of this rule. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

An order transferring possession of a motor vehicle was a mandatory injunction and, therefore, the appellate court had jurisdiction of an appeal of the order under subdivision (a)(6) of this rule. *Timmons v. McCauley*, 71 Ark. App. 97, 27 S.W.3d 437 (2000).

An order which purported to stay a regulation issued by the Game and Fish Commission was actually an injunction and, therefore, was appealable under subdivision (a)(6) of this rule. *Ark. State Game & Fish Comm'n v. Sledge*, 344 Ark. 505, 42 S.W.3d 427 (2001).

Application for a hearing to dissolve a temporary restraining order is not a prerequisite to appeal; subdivision (a)(6) of this rule is clearly written in the alternative, providing for an interlocutory appeal from the grant of an injunction, and also for an interlocutory appeal from an order refusing to dissolve an injunction. *Three Sisters Petroleum v. Langley*, 348 Ark. 167, 72 S.W.3d 95 (2002).

After being ordered to produce documents that it claimed were protected by the attorney-client privilege and the work-product doctrine in a suit alleging negligence, strict liability, and breach of warranties arising from a vehicle fire, the car company and the dealership sought an interlocutory appeal to review the trial court's findings with respect to the question of whether the documents were subject to discovery; however, because the documents were not the object of the lawsuit and did not fall within a discovery exception and the appeal was from an interlocutory order concerning a discovery matter and that, pursuant to this rule, the appellate court lacked jurisdiction to consider, the issue of whether the documents were privileged could not be reached. *Ford Motor Co. v. Harper*, 353 Ark. 328, 107 S.W.3d 168 (2003).

Finding against the oil companies was improper where the circuit court abused its discretion in concluding that there was irreparable harm to the landowners and in refusing to modify the temporary restraining order; further, the interlocutory order was specifically appealable under subdivision (a)(6) of this rule. *AJ&K Operating Co. v. Smith*, 355 Ark. 510, 140 S.W.3d 475 (2003).

Because the specific provision authorizing an appeal under subdivision (a)(6) of this rule controls over the general provisions in subdivision (a)(1) of this rule and ARCP 54(b) without regard to the provisions of Rule 54(b), the purchaser's appeal of a mandatory injunction issued against the purchaser enjoining the purchaser from maintaining property or possessory rights was properly appealed despite not being a final order. *Crain v. Burns*, 82 Ark. App. 88, 112 S.W.3d 371 (2003).

Appellate court lacked jurisdiction to hear

an appeal concerning the trial court's denial of the school district's motion to recuse; this rule did not authorize an interlocutory appeal from the denial of a motion to recuse. *Manila Sch. Dist. No. 15 v. Wagner*, 357 Ark. 20, 159 S.W.3d 285 (2004).

'Appellate court dismissed trucking company's appeal as it was an interlocutory appeal that it had no authority to entertain; the company's nonsuited claims of breach of warranty and negligence against the manufacturer could be refiled. *Pro Transp., Inc. v. Volvo Trucks N. Am., Inc.*, 96 Ark. App. 166, 239 S.W.3d 537 (2006).

Because a decision to grant a temporary restraining order regarding the expulsion of two students could have been appealed under subdivision (a)(6) of this rule, a petition for a writ of certiorari was not granted. Moreover, a writ of prohibition was not appropriate since an order had already been entered in the case. *Helena-West Helena Sch. Dist. #2 v. Circuit Court*, 368 Ark. 549, 247 S.W.3d 823 (2007).

In a civil rights action against a state trooper, there was a proper interlocutory appeal under subdivision (a)(2) of this rule after the denial of a motion to dismiss because immunity was asserted under Ark. Const., Art. 5, § 20. *Simons v. Marshall*, 369 Ark. 447, 255 S.W.3d 838 (2007).

Former employer was properly granted a preliminary injunction against an employee because the nondisclosure and noncompetition provisions in an employment contract were not broader than necessary to protect the former employer's interests; it was not an abuse of discretion to not base the injunction on the Arkansas Trade Secrets Act also. *Freeman v. Brown Hiller, Inc.*, 102 Ark. App. 76, 281 S.W.3d 749 (2008).

In a case seeking a mandatory injunction that would compel the removal of landowners' oak trees and a metal storage building, and other actions, although the trial court declined to rule on one of the issues before it, the appeal of its interlocutory order was proper, pursuant to subdivision (a)(6) of this rule. *Perkins v. Henry*, 2010 Ark. App. 126, — S.W.3d —, 2010 Ark. App. LEXIS 145 (Feb. 11, 2010).

Appellant's notice of appeal from a trial court's final judgment was not ineffective to appeal the trial court's earlier dismissal of a funeral services company from his lawsuit as, until the entire case was disposed of, there was no final order to appeal pursuant to subdivision (a)(11) of this rule and Ark. R. Civ. P. 54(b). An appeal from a final order also brought up for review any intermediate order involving the merits and necessarily affecting the judgment, pursuant to subsection (b) of this rule and Ark. R. App. P. Civ. and 3(a). *King v. French*, 2011 Ark. App. 257, — S.W.3d —, 2011 Ark. App. LEXIS 271 (Apr. 6, 2011).

In an eminent domain case in which an order of immediate possession was granted, because the issue of just compensation remained to be determined, the order granting immediate possession was not a final, appealable order. The construction of a bicycle trail would not render it impossible to restore his property to its previous condition. *Thomas v. City of Fayetteville*, 2012 Ark. 120, — S.W.3d —, 2012 Ark. LEXIS 146 (Mar. 15, 2012).

Arkansas Supreme Court considered the appeal, because although the order denying the motion to quash and for sanctions was not a final order, the Court considered the appeal as a petition for extraordinary relief under the Court's original jurisdiction. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

Jurisdiction.

Even when the parties have not raised the issue, the question of a final order is a jurisdictional question which the appellate court can raise itself, and not only does the court have the power to raise the issue, but it is the court's duty to determine whether it has jurisdiction over the subject matter. *Roy v. International Multifoods Corp.*, 268 Ark. 958, 597 S.W.2d 129 (1980); *Hyatt v. City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *Moran v. Arkansas Blue Cross & Blue Shield, Inc.*, 295 Ark. 124, 746 S.W.2d 62 (1988); *Widmer v. Touhey*, 297 Ark. 85, 759 S.W.2d 562 (1988).

Where no final or otherwise appealable order entered, court lacks jurisdiction to hear appeal. *Hall v. Lunsford*, 292 Ark. 655, 732 S.W.2d 141 (1987); *Widmer v. Touhey*, 297 Ark. 85, 759 S.W.2d 562 (1988).

While question of jurisdiction can be "raised at any time," that is not to say that the issue can be appealed at any point in the proceedings, but rather that no previous objection is needed in order to preserve the question at a later stage in the proceedings, i.e., that the objection may be raised at any time. *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988).

Subsection (b) of this rule gives the appellate court jurisdiction of both an order setting aside a default judgment, and a subsequent order dismissing the complaint, rendering it unnecessary to address the question of whether the order setting aside the default judgment after ninety days would, by itself, be a final order. *Hubbard v. Shores Group, Inc.*, 313 Ark. 498, 855 S.W.2d 924 (1993).

The record must disclose a final adjudication of the matter in controversy between the parties for the appellate court to have jurisdiction. *State Office of Child Support Enforcement v. Morrison*, 318 Ark. 563, 885 S.W.2d 900 (1994).

While the trial court's jurisdiction of the

subject matter is essential to an action, a ruling by the trial court that it has proper jurisdiction, even if erroneous, does not render such order appealable; because a final order is a jurisdictional requisite the appellate court should raise the issue on its own motion. *Lester v. Lester*, 48 Ark. App. 40, 889 S.W.2d 42 (1994).

Appellate court dismissed an appeal from an order of summary judgment because the order did not dispose of claims against 10 John Doe defendants and had not been certified as final pursuant to ARCP 54; absent a final appealable order, the appellate court lacked jurisdiction to consider the appeal. *Moses v. Hanna's Candle Co.*, 353 Ark. 101, 110 S.W.3d 725 (2003).

Trial court had jurisdiction to hear lawyers' claim for fees even though the company appealed dismissal of its counterclaim that sounded in malpractice before the lawyers' claim went forward as the claims were unrelated. *Nameloc, Inc. v. Jack, Lyon & Jones, P.A.*, 362 Ark. 175, 208 S.W.3d 129 (2005).

Appellate court had jurisdiction to hear the denial of relief from a default judgment entered in a medical malpractice case where the patient's motion to strike an answer was granted; the specific provisions of subdivision (a)(4) of this rule controlled over subdivision (a)(1) of this rule and Ark. R. Civ. P. 54(b). *Fields v. Byrd*, 96 Ark. App. 174, 239 S.W.3d 543 (2006).

Court did not have jurisdiction to address the appeal of a partial summary judgment motion because there were issues remaining to be resolved in the underlying action and the trial court did not certify its order for review pursuant to Ark. R. Civ. P. 54(b). *Brasfield v. Murray*, 96 Ark. App. 207, 239 S.W.3d 551 (2006).

Court of appeals did not have jurisdiction pursuant to subdivision (a)(1) of this rule to hear the wife's appeal as a final order had not been entered by the trial court when it conditionally granted the order of protection against the husband but made it contingent upon his paying costs with the wife being allowed to "assist" him, tantamount to shifting the costs to the wife in violation of § 9-15-202 because the statute specifically stated that the petitioner should not be required to bear those costs. *Dobbs v. Dobbs*, 99 Ark. App. 156, 258 S.W.3d 414 (2007).

Multiple Orders.

Where in each of the orders entered by the court prior to the decree of divorce of September 24, 1979, the chancellor specifically held in abeyance certain items which were to be decided later, and therefore, it was obvious the court never intended to terminate the case until the final decree was entered, all of the orders would be reviewed and treated as timely appealed. *Wilson v. Wilson*, 270 Ark.

485, 606 S.W.2d 56 (1980).

Multiple Parties or Claims.

Where there is an attempt to appeal from an order dismissing one defendant when other defendants remain and ARCP 54(b) is not complied with, the rules of civil procedure do not permit an appeal in such cases except in accordance with ARCP 54(b), and where that is not done, the order is not appealable under this rule. *Kilcrease v. Butler*, 291 Ark. 275, 724 S.W.2d 169 (1987).

Rule contemplates an appeal from an order granting or refusing a new trial in cases in which all issues have been presented and decided and has no application to cases involving multiple issues or claims in which some, but not all, are decided. *Rusin v. Midwest Enamellers, Inc.*, 21 Ark. App. 226, 731 S.W.2d 226 (1987).

Pursuant to subdivision (a)(3) of this rule, a party may appeal from an order which grants or refuses a new trial; however, when the cause of action involves multiple parties and multiple claims, the finality of the trial court's judgment is determined by ARCP 54(b). *GMAC v. Eubanks*, 318 Ark. 640, 887 S.W.2d 292 (1994).

The dismissal of plaintiff's wrongful death action against a physician and John Does No. 1-10 for lack of standing concluded all claims against all parties because the complaint was a nullity. *McKibben v. Mullis*, 79 Ark. App. 382, 90 S.W.3d 442 (2002).

In police officer's suit against drivers who hit him in different car accidents, the officer's appeal from the trial court's order granting the drivers' motions for severance was dismissed as the order granting severance in no way discontinued the litigation and there was no final disposition of any material issue. *Lackey v. Bramblett*, 355 Ark. 414, 139 S.W.3d 467 (2003).

Subdivision (a)(9) of this rule only allows appeals from an order granting or denying a motion to certify a case as a class action in accordance with Ark. R. Civ. P. 23; dismissal of claims underlying a class action should not equate to denial of class certification such that, where the underlying claims in a potential class action were dismissed and those claims were fewer than all of the claims in the lawsuit, the dismissal of such claims without the resolution of the remaining claims did not constitute a final order. *Carquest of Hot Springs, Inc. v. Gen. Parts, Inc.*, 361 Ark. 25, 204 S.W.3d 53 (2005).

In an insurance coverage dispute involving multiple defendants, the court lacked jurisdiction over the appeal of the order granting partial summary judgment in favor of five defendants as an order that did not adjudicate the liabilities of all parties was not a

final, appealable order. *Ver Weire v. CNA Fin. Corp.*, 92 Ark. App. 353, 213 S.W.3d 646 (2005).

Claim for conversion against mortgagors, a husband and wife, filed by the purchaser of property that was sold at a foreclosure sale was still pending against wife where the trial court only entered judgment against husband; hence, the judgment was not appealable as it did not dispose of all pending claims, and the trial court did not comply with Ark. R. Civ. P. 54(b). *Seay v. C.A.R. Transp. Brokerage Co.*, 366 Ark. 527, 237 S.W.3d 48 (2006).

In a wrongful-death case, an appeal was dismissed because there was no final order under subdivision (a)(1) of this rule and Ark. R. Civ. P. 54(b) where there was no disposition regarding several John Doe parties named in the case. *Downing ex rel. Estate of Harris v. Lawrence Hall Nursing Ctr.*, 368 Ark. 51, 243 S.W.3d 263 (2006).

In a case involving the judicial dissolution of a law firm, an appeal summarily denying several creditors' claims was dismissed without prejudice since there was no final appealable judgment under this rule and Ark. R. Civ. P. 54(b) where a counterclaim filed by a law firm's shareholder was not decided. *Sims v. Fletcher*, 368 Ark. 178, 243 S.W.3d 863 (2006).

Despite an oral pronouncement, because there was no written judgment regarding a default judgment entered in a foreclosure action, the case was dismissed without prejudice under Ark. R. Civ. P. 54(b); the record was void of any proof that one alleged interest holder was served, so it was impossible to tell if a default judgment was appropriate. *Natl Home Ctrs., Inc. v. Coleman*, 370 Ark. 119, 257 S.W.3d 862 (2007).

Tobacco manufacturer's appeal was premature because (1) the matter was consolidated with another pending action; (2) Arkansas's Ark. R. Civ. P. 54(b) was substantially identical to Fed. R. Civ. P. 54(b); (3) an appeal of a judgment disposing of fewer than all claims in a consolidated case required Fed. R. Civ. P. 54(b) certification; and (4) the issues were similar and intertwined, and the manufacturer argued in a lower court that the consolidated cases both concerned the alleged obligation of the manufacturer to make escrow payments to the State pursuant to § 26-57-260. *Grand River Enters. Six Nations, Ltd. v. Beebe*, 372 Ark. 384, 277 S.W.3d 171 (2008).

Arkansas Supreme Court could not reach the merits of appellants' arguments because the judgment was not final and appealable, and there was neither a final judgment as to all the parties and claims, nor was there an Ark. R. Civ. P. 54(b) certification; the judgment only dismissed certain claims and the other claims the administratrix alleged in her complaints had yet to be adjudicated or properly dismissed with respect to all named ap-

pellants. *Beverly Enters. v. Keaton*, 2009 Ark. 431, — S.W.3d —, 2009 Ark. LEXIS 593 (2009).

Order denying a husband's motion for declaratory judgment and his motion for reconsideration of his discovery requests for the medical records of his wife was not a final, appealable order under Ark. R. Civ. P. 54(b) and subdivision (2)(a)(1) of this rule; the appeal was dismissed without prejudice. *Hardy v. Hardy*, 2010 Ark. 41, — S.W.3d —, 2010 Ark. LEXIS 51 (Jan. 28, 2010).

Where there was no order in the record in a medical malpractice case disposing of a physician's crossclaim against a hospital, a reviewing court was without jurisdiction under subdivision (a)(1) of this rule and had to dismiss the appeal without prejudice so that the trial court could enter a final order under Ark. R. Civ. P. 54(b) as to the pending crossclaim. *Ketan Bulsara v. Watkins*, 2010 Ark. 453, — S.W.3d —, 2010 Ark. LEXIS 555 (Nov. 18, 2010).

Court of appeals lacked jurisdiction to hear an appeal because plaintiff did not file a timely appeal from the trial court's final order under Ark. R. App. P. Civ. 4(b); the order made it clear that all of the named and served defendants were dismissed, and pursuant to Ark. R. Civ. P. 54(b)(5), the remaining defendants, who had not been served, were also dismissed. *Global Econ. Res., Inc. v. Swaminathan*, 2011 Ark. App. 349, — S.W.3d —, 2011 Ark. App. LEXIS 387 (May 11, 2011).

In a case involving the disposition of county property in which a taxpayers group appealed a county court's entry of summary judgment in favor of a county judge, there was no final appealable order under subsection (b) of this rule as the grant of summary judgment did not dispose of the complaint against all defendants. There was a remaining defendant that had been served, and the group failed to include a statement in its notice of appeal that it was abandoning any pending but unresolved claim, which would have operated as a dismissal with prejudice of its claim against that defendant. *Searcy County Counsel for Ethical Gov't v. Hinchey*, 2011 Ark. 533, — S.W.3d —, 2011 Ark. LEXIS 618 (Dec. 15, 2011).

Appeal of an order dismissing a breach of contract and fraud action was dismissed without prejudice because the record did not reflect that one party had ever been dismissed from the case; therefore, the trial court's order was not final and appealable under subdivision (a)(1) of this rule. *Hotfoot Logistics, LLC v. Shipping Point Mktg.*, 2012 Ark. 76, — S.W.3d —, 2012 Ark. LEXIS 87 (Feb. 23, 2012).

Non-Appealable Order.

Where trial court ruled that utilizing § 9-10-108 to allow blood tests in evidence only to

exclude paternity was not a denial of equal protection and that blood tests would not be admitted to establish paternity, such ruling was evidentiary and thus not an appealable order under this rule. *Story v. Hodges*, 272 Ark. 365, 614 S.W.2d 506 (1981).

Where original order was entered to sell certain lands and appellees filed notice of appeal but, instead of perfecting the appeal, proceeded to order the land sold as provided for in original order, an order overruling appellant's motion to restrain the sale was interlocutory order and not a final appealable order under this rule. *Cash v. Cash*, 273 Ark. 32, 616 S.W.2d 13 (1981).

Where in an eminent domain proceeding to procure an easement across defendants' property, the chancellor held that the city had the authority to enter and take private property for the lawful purpose of furnishing light and power to consumers in connection with the operation of the municipal corporation, the chancellor's order was not appealable because it was not a final judgment in that it did not determine the right of the landowners to just compensation. *Hyatt v. City of Bentonville*, 275 Ark. 210, 628 S.W.2d 326 (1982).

An order transferring a suit from law to equity, or the reverse, is not appealable. *McIlroy Bank & Trust v. Zuber*, 275 Ark. 345, 629 S.W.2d 304 (1982).

A trial court's order refusing to dismiss amended complaints was not a final order which could be appealed under this rule. *Celotex Corp. v. Little Rock Sch. Dist.*, 276 Ark. 481, 637 S.W.2d 566 (1982).

The denial of a motion to strike portions of a pleading is not a final order under this rule. *Celotex Corp. v. Little Rock Sch. Dist.*, 276 Ark. 481, 637 S.W.2d 566 (1982).

An order which merely indicates the direction a court will rule in the future is not a final, appealable order. *Scaff v. Scaff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982).

Where the court determined the parties' rights and obligations in foreclosure action, but failed to provide for any execution of the court's order, and clearly directed that further judicial action would be necessary before foreclosure and its execution would be ordered, such order was not a final, appealable order. *Scaff v. Scaff*, 5 Ark. App. 300, 635 S.W.2d 292 (1982).

Where the trial court did not dismiss the parties from the court, nor discharge them from the action, nor conclude their rights to the subject matter in controversy, but did, acting on a motion for summary judgment, make findings of fact and conclusions of law which narrowed the issues raised by the amended complaint, and where the trial court did not grant summary judgment in the whole case, but simply determined what it thought to be the controverted issues and continued

the case for a jury trial, such procedure was contemplated by ARCP 56(d) and was not the equivalent of a final determination of the case so as to constitute an appealable order. *Heffner v. Harrod*, 278 Ark. 188, 644 S.W.2d 579 (1983).

Where insurer did not stand on its motion to dismiss and permit the entry of judgment for the insured, it was not entitled to a decision in Supreme Court, on petition for writ of review, about whether the plaintiff's complaint stated a cause of action. *Farm Bureau Mut. Ins. Co. v. Southall*, 281 Ark. 141, 661 S.W.2d 383 (1983).

The weight of authority is that an order granting permission to intervene is not appealable. *Corning Bank v. Delta Rice Mills, Inc.*, 281 Ark. 342, 663 S.W.2d 737 (1984).

Where the trial court granted a default judgment but deferred the claim for punitive damages, the appeal was dismissed because there was no final judgment or order entered. *Tapp v. Fowler*, 288 Ark. 70, 702 S.W.2d 17 (1986).

Where in an action against the defendants for wrongfully cutting timber from land owned by the plaintiffs, the trial court entered an order holding that the defendants could not be trespassers on the interest of their cotenants (the plaintiffs) and thus that § 18-60-102 did not apply, the court's ruling was not upon a separable branch of the litigation and thus an appeal was not permissible under subdivision (a)(2) of this rule, since there had been no final or otherwise appealable order entered. *Budd v. Davis*, 289 Ark. 373, 711 S.W.2d 478 (1986).

The setting aside of a default judgment is not a final judgment by the trial court and is not therefore appealable. *Schueck Steel, Inc. v. McCarthy Bros. Co.*, 289 Ark. 436, 711 S.W.2d 820 (1986).

Appellants' agreement that, if appellants failed to prevail on appeal of one issue, appellants would not contest remaining matters and would agree to a consent order, did not render trial court's order final and appealable. *Hall v. Lunsford*, 292 Ark. 655, 732 S.W.2d 141 (1987).

An order merely announcing the court's determination of the rights of the parties, but contemplating further judicial action, is not an appealable one. *Bonner v. Sikes*, 20 Ark. App. 209, 727 S.W.2d 144 (1987).

Temporary award of custody with reservation of all other issues for further action by the chancellor held unappealable. *Harper v. Harper*, 21 Ark. App. 255, 731 S.W.2d 241 (1987).

Orders of remand are not final, appealable orders. *Samuels Hide & Metal Co. v. Griffin*, 23 Ark. App. 3, 739 S.W.2d 698 (1987).

Where trial court bifurcated the issues before it and reserved determination of the issue

of damages for a later date, its decree was not a final judgment or decree under this rule and ARCP 54(b). *Mueller v. Killam*, 295 Ark. 270, 748 S.W.2d 141 (1988).

Trial court's order compelling arbitration did not in effect determine the action or discontinue it. *Chem-Ash, Inc. v. Arkansas Power & Light Co.*, 296 Ark. 83, 751 S.W.2d 353 (1988).

An order which merely determines liability and defers a determination as to the damages is not final. *John Cheeseman Trucking, Inc. v. Dougan*, 305 Ark. 49, 805 S.W.2d 69 (1991).

The final rulings on those issues common to the class were not rendered nonappealable when coupled with the ruling awarding attorney's fees in an unliquidated amount, and a requirement that the defendants submit a plan for providing notice to the class of their rights to a refund and establishing the procedures for such refunds, for such was a collateral ministerial order. *Pledger v. Bosnick*, 306 Ark. 45, 811 S.W.2d 286 (1991), cert. denied 509 U.S. 921, 113 S. Ct. 3034, 125 L. Ed 2d 721 (1993), overruled Department of Fin. & Admin. v. Staton, 325 Ark. 341, 942 S.W.2d 804 (1996).

An order directing each party to submit monthly requests for fees and costs as they accrued was a preliminary order entered routinely in divorce suits and expressly subject to further orders of the court as the case evolved, thus not final nor appealable. *Stephens v. Stephens*, 306 Ark. 59, 810 S.W.2d 946 (1991).

The trial court's order denying defendant's motion to vacate the reinstatement of his case was not a final judgment or order from which an appeal may be taken. *Jackson v. Yowell*, 307 Ark. 222, 818 S.W.2d 950 (1991).

The denial of a motion requesting the postponement of a revocation hearing is not a final judgment for purposes of appeal. *Duncan v. State*, 308 Ark. 205, 823 S.W.2d 886 (1992).

An order transferring a suit from law to equity or vice versa is not a final, appealable order. *Wallner v. McDonald*, 308 Ark. 590, 825 S.W.2d 265 (1992).

In a suit alleging paternity, an order for the defendant to report for paternity blood testing under § 9-10-108 is not final, and therefore not appealable under subsection (a) of this rule. *Helton v. Arkansas Dep't of Human Servs.*, 309 Ark. 268, 828 S.W.2d 842 (1992).

An order granting an extension to docket a record on appeal is not an appealable order. *Leonard v. Leonard's Hdwe., Inc.*, 309 Ark. 450, 828 S.W.2d 846, appeal dismissed 840 S.W.2d 167 (1992).

An order denying a protective order to quash a subpoena is not a final order for appeal purposes. Specifically, it is not a final judgment or order under subdivision (a)(1) of this rule; nor is it an order under subdivision

(a)(2) of this rule which determines the “action.” *In re Badami*, 309 Ark. 511, 831 S.W.2d 905 (1992).

The Rules of Appellate Procedure make no provision for appeal from the granting or denial of a motion to strike an order. *Burns v. Burns*, 309 Ark. 602, 832 S.W.2d 251 (1992).

An order directing that certain distributions be made from appellant’s estate, which also noted there were sufficient funds in the estate to pay the claim was not appealable, and did not cause the trial court to lose jurisdiction to make any further orders. *In re Estate of Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992).

Where an order vacating a default judgment was entered within ninety days of the entry of the judgment, and where the case had never been fully contested by the parties, it was not a final and appealable order. *Lamb v. JFM, Inc.*, 311 Ark. 89, 842 S.W.2d 10 (1992).

Former SCR 29(1)(k) (see now SCCAPPR 1-2) permitted interlocutory appeals, and subsection (a) of this rule specifies those orders that are appealable; none of the categories for interlocutory orders from which appeals may be taken under subsection (a) of this rule embrace an order for paternity blood tests and therefore an appeal from such an order is premature. *Scheland v. Childres*, 313 Ark. 165, 852 S.W.2d 791 (1993).

The denial of appellant’s motion to set aside an ex parte order for lack of jurisdiction is not an appealable order because it is not a final decree within the meaning of subsection (a) of this rule. *Lester v. Lester*, 48 Ark. App. 40, 889 S.W.2d 42 (1994).

Court’s order denying plaintiff the use of a pseudonym to prosecute her lawsuit did not dismiss the parties from the court or conclude their rights to the subject matter in controversy; rather the court’s ruling was on a preliminary matter, unconnected with the merits of the litigation, and the order could not be considered as final or ending a separable branch of the litigation. *Doe v. Union Pac. R.R.*, 323 Ark. 237, 914 S.W.2d 312 (1996).

The court would dismiss an appeal without prejudice pertaining to storage charges on a motor vehicle seized by the police in connection with drug-related offenses since there was no final, appealable order where the order contemplated further legal action to perfect title to the motor vehicle and did not determine a final, liquidated amount of storage costs to be charged. *Payne v. State*, 333 Ark. 154, 968 S.W.2d 59 (1998).

Where the defendants claimed the defense of sovereign immunity, that is, jurisdictional immunity from suit and the trial court denied its motion for summary judgment, the court

order was appealable. *Ozarks Unlimited Resources Coop. v. Daniels*, 333 Ark. 214, 969 S.W.2d 169 (1998).

The court would dismiss an appeal without prejudice since there was no final, appealable order where the Civil Service Commission left several issues unresolved with regard to the termination of the plaintiff police officer. *McGann v. Pine Bluff Police Dep’t*, 334 Ark. 352, 974 S.W.2d 462 (1998).

Where the trial court ordered a sum of cash to be forfeited and also ordered the State to restrain substitute assets to be forfeited if the defendant were convicted of drug offenses, there was no final, appealable order. *Corbit v. State*, 334 Ark. 592, 976 S.W.2d 927 (1998).

Orders based upon emergency hearings pursuant to § 9-27-315 are not final, appealable orders. *Dover v. Arkansas Dep’t of Appeal Human Servs.*, 62 Ark. App. 37, 968 S.W.2d 635 (1998).

Fed. R. Civ. P. 55(c) should be interpreted in accordance with federal case law; under federal law, a district court’s grant of a motion to set aside a default judgment was not an appealable final order where the setting-aside paved the way for a trial on the merits and, under similar circumstances, the Arkansas Supreme Court held that the Arkansas trial court’s order setting aside a default judgment, entered more than 90 days after the default judgment was entered, was not a final appealable order. *Epting v. Precision Paint & Glass, Inc.*, 353 Ark. 84, 110 S.W.3d 747 (2003).

Ark. Sup. Ct. Prof. Conduct P. 12(A) allowed appeals to be taken from any action by a panel taken at a public hearing; thus, where the attorney was not appealing an action by a panel taken at a public hearing, but was challenging the order denying his motion to dismiss a complaint against him, it was not a final order, as required by subdivision (a)(1) of this rule, and the appellate court did not have jurisdiction to hear the appeal. *Burnett v. Supreme Court Comm. on Prof’l Conduct*, 359 Ark. 279, 197 S.W.3d 458 (2004).

Writ of prohibition sought by a doctor who had been named in a wrongful death of an unborn fetus action was denied where, once the trial court had disposed of all the claims that could have been alleged in pleadings, the doctor could then appeal the denial of her motion to dismiss; the State Supreme Court had never used an extraordinary writ to narrow the claims alleged in a complaint and had never retreated from its unequivocal rule that an asserted threat of an unwarranted trial was an insufficient basis to conclude that the remedy by appeal was not adequate. *Cockrum v. Fox*, 359 Ark. 508, 199 S.W.3d 69 (2004).

An appeal from the circuit court’s order of December 31, 2003, was subject to dismissal as the order was not a final order because the unjust-enrichment claim was still pending

and the order contained no certification pursuant to Ark. R. Civ. P. 54(b). *Servewell Plumbing, LLC v. Summit Contrs., Inc.*, 360 Ark. 521, 202 S.W.3d 525 (2005).

While there are exceptions to the finality requirement set forth in subsection (a) of this rule, a demand for a jury trial, even when requested in an answer, is not “part of the answer” for purposes of the exception set forth in subdivision (a)(4) of this rule. *Liberty Life Ins. Co. v. McQueen*, 364 Ark. 367, 219 S.W.3d 172 (2005).

Court dismissed insurer’s appeal of an order denying its demand for a jury trial in insured’s action for payment on a claim because a demand for a jury trial, even when requested in an answer, was not “part of the answer” for purposes of the exception set forth in subdivision (a)(4) of this rule. *Liberty Life Ins. Co. v. McQueen*, 364 Ark. 367, 219 S.W.3d 172 (2005).

From a property owner’s trespass action against his neighbor, his motion for a writ of certiorari from the denial of his request to prohibit the neighbor’s entry on his land was dismissed because, under subdivision (a)(6) of this rule, an order denying a hearing, even on a motion for injunctive relief, was not appealable. *Chiodini v. Lock*, 373 Ark. 88, 281 S.W.3d 728 (2008).

Partition order was not final within the meaning of subdivision (a)(1) of this rule because the proper order from which to file an appeal in a partition action was the order confirming the sale of the property. *Trafford v. Lilley*, 2010 Ark. App. 158, — S.W.3d —, 2010 Ark. App. LEXIS 157 (Feb. 17, 2010).

Reviewing court lacked jurisdiction to consider the appeal, because the order appealed was not a final order, when it contemplated further action, and the order did not satisfy Ark. R. Civ. P. 54(b), when the order did not contain specific factual findings of any danger of hardship or injustice that could be alleviated by an immediate appeal. *Robinson v. Villines*, 2012 Ark. 211, — S.W.3d —, 2012 Ark. LEXIS 236 (May 17, 2012).

Notice.

The notice of appeal was not defective in referring only to the court’s denial of a motion for a new trial instead of to the original judgment on the verdict. No greater specificity was necessary since an order refusing a new trial is final and brings up for review any preceding order involving the merits. *DeClerk v. Tribble*, 276 Ark. 316, 637 S.W.2d 526 (1982).

Where parents failed to file notice of appeal from an adjudication order terminating their parental rights, parents’ argument that the trial court erred in finding grounds for termination of parental rights at the adjudication hearing conducted January 4 and 5, 2005, prior to the termination hearing being held

and without notice to the appellants that a termination hearing would be conducted was not preserved for appeal. *Sowell v. Ark. Dep’t of Human Servs.*, 96 Ark. App. 325, 241 S.W.3d 767 (2006).

Although defendant’s notice of appeal designated an incorrect circuit court case number in its heading, the notice was deemed sufficient under subsection (a) of this rule where the court was easily able to determine from the notice the order from which the appeal was taken. *Jackson v. State*, 2011 Ark. App. 528, — S.W.3d —, 2011 Ark. App. LEXIS 583 (Sept. 14, 2011).

Small Claims Actions.

Claimant was restricted from bringing an action in the small-claims division of the district court to collect small-claim judgments, because she fit the definition of a collection agency, when the claimant collected a delinquency for a fee under Administrative Order of the Supreme Court No. 18, § 4(b). *Wilson v. Dardanelle Dist. of the Dist. Court of Yell County*, 375 Ark. 294, 290 S.W.3d 1 (2008).

Sovereign Immunity.

Medical malpractice claim against the University of Arkansas for Medical Sciences (UAMS) was dismissed, pursuant to an interlocutory appeal, because, as a department of the University of Arkansas, the UAMS was not an entity that could be sued; the doctrine of sovereign immunity barred a claim against the University of Arkansas and its Board of Trustees because a finding for the patient against the UAMS would necessarily subject the State of Arkansas to financial liability, and sovereign immunity barred such an action unless it had been waived. *Univ. of Ark. for Med. Scis. v. Adams*, 354 Ark. 21, 117 S.W.3d 588 (2003).

Absence of an express ruling on a lottery commission’s motion to dismiss a trademark infringement claim based on sovereign immunity was fatal to an interlocutory appeal under subdivision (a)(10) of this rule; the trial court did not address the immunity issue, and denied the motion to dismiss because the owner had stated a claim for infringement. *Ark. Lottery Comm’n v. Alpha Mktg.*, 2012 Ark. 23, — S.W.3d —, 2012 Ark. LEXIS 32 (Jan. 26, 2012).

Standing.

Where appellee’s ultimately took a voluntary nonsuit pursuant to ARCP 41(a), the appellants had no standing to appeal from rulings of the trial court having to do with the merits of their claim because the litigation had been resolved in their favor. *Cowan v. Schmidle*, 312 Ark. 256, 848 S.W.2d 421 (1993).

A prevailing party cannot appeal. *Walker v. Kazi*, 316 Ark. 616, 875 S.W.2d 47 (1994).

Summary Judgment.

Summary judgment entered held deficient as a judgment and final determination of the rights of the parties. *Estate of Hastings v. Planters & Stockmen Bank*, 296 Ark. 409, 757 S.W.2d 546 (1988).

Party's failure to file a timely notice of appeal with regard to an order granting summary judgment to her former attorney in an action seeking recovery of attorney's fees and costs, and her failure to argue the trial court's decision on the post-trial motion for fees and costs in her original brief led to dismissal of the appeal for lack of jurisdiction. *Stacks v. Marks*, 354 Ark. 594, 127 S.W.3d 483 (2003).

Builder's appeal from a trial court decision granting partial summary judgment to a home buyer allowing her to raise the defense of usury and granting other relief was not from a final judgment as required by this rule, and therefore the builder's appeal was dismissed. *Brasfield v. Murray*, 2009 Ark. App. 879, — S.W.3d —, 2009 Ark. App. LEXIS 1008 (2009).

Termination of Parental Rights.

Appointed counsel for an indigent parent on a first appeal from an order terminating parental rights may petition the court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005).

Where the mother appealed the judgment terminating her parental rights, counsel filed a no-merit brief; however, the brief failed to abstract at least three rulings adverse to the mother in the termination hearing, thus, counsel's motion to withdraw was denied and a rebriefing was ordered. *Causer v. Ark. Dep't of Human Servs.*, 93 Ark. App. 483, 220 S.W.3d 270 (2005).

Trial court retains jurisdiction to hold an additional hearing subsequent to the filing of a notice of appeal and the lodging of a trial transcript where the case involves a juvenile out-of-home placement; therefore, a trial court was allowed to terminate a mother's parental rights while her appeal from a decision regarding a petition for dependency-neglect was pending. *Harwell-Williams v. Ark. Dep't of Human Servs.*, 368 Ark. 183, 243 S.W.3d 898 (2006).

Workers' Compensation Commission.

Ordinarily, an order of the Workers' Compensation Commission is reviewable only at the point where it awards or denies compensation. *Banquet Foods v. McGlothlin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988); *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988); *Baldor Elec. Co. v. Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989).

Where all of the evidence on the issue of the

statute of limitations had been presented to an administrative law judge, his finding that the claim was not barred by the statute of limitations was not appealable, for all the parties' rights had not been resolved, there had been no award or denial of benefits, and the Workers' Compensation Commission's order was not final. Should the commission award benefits, and if the employer chooses to appeal, the limitations issues could be raised then. *Banquet Foods v. McGlothlin*, 26 Ark. App. 130, 760 S.W.2d 880 (1988).

Workers' Compensation Commission's jurisdictional finding is purely an incidental issue and is not appealable. *Mid-State Constr. v. Sealy*, 26 Ark. App. 186, 761 S.W.2d 951 (1988).

Workers' Compensation Commission's remand was not a final determination, and thus not an appealable order. *Hope Brick Works v. Welch*, 27 Ark. App. 90, 768 S.W.2d 37 (1989); *Baldor Elec. Co. v. Jones*, 29 Ark. App. 80, 777 S.W.2d 586 (1989).

Cited: *American Trucking Ass'n v. Gray*, 280 Ark. 258, 657 S.W.2d 207 (1983); *Bradley v. Arkansas La. Gas Co.*, 280 Ark. 492, 659 S.W.2d 180 (1983); *Tulio v. Arkansas Blue Cross & Blue Shield, Inc.*, 283 Ark. 278, 675 S.W.2d 369 (1984); *Fort Smith Symphony Orchestra, Inc. v. Fort Smith Symphony Ass'n*, 285 Ark. 284, 686 S.W.2d 418 (1985); *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985), criticized *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992); *Ford Motor Credit Co. v. Nesheim*, 287 Ark. 78, 696 S.W.2d 732 (1985), overruled *International Union of Electrical, etc. v. Hudson*, 295 Ark. 107, 747 S.W.2d 81 (1988), questioned *Arkansas Louisiana Gas Co. v. Morris*, 294 Ark. 496, 744 S.W.2d 709 (1988); *Sun Marine Terms v. Tosco Corp.*, 287 Ark. 233, 697 S.W.2d 901 (1985); *Arkholia Sand & Gravel Co. v. Hutchinson*, 289 Ark. 313, 711 S.W.2d 474 (1986); *Dixie Furn. Co. v. Arkansas Power & Light Co.*, 19 Ark. App. 160, 718 S.W.2d 120 (1986); *Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987); *Henderson Methodist Church v. Sewer Imp. Dist. No. 142*, 294 Ark. 188, 741 S.W.2d 272 (1987); *Day v. Day*, 20 Ark. App. 48, 723 S.W.2d 378 (1987); *Smith v. Arkansas State Hwy. Comm'n*, 21 Ark. App. 49, 728 S.W.2d 202 (1987); *In re S.J.B.*, 294 Ark. 598, 745 S.W.2d 606 (1988); *Jones v. Goodson*, 298 Ark. 434, 768 S.W.2d 33 (1989); *Karnes v. Trumbo*, 28 Ark. App. 34, 770 S.W.2d 199 (1989); *Brimer v. State*, 301 Ark. 540, 785 S.W.2d 458 (1990); *Arkansas State Hwy. Comm'n v. Johns*, 302 Ark. 291, 789 S.W.2d 450 (1990); *Carmical v. City of Beebe*, 302 Ark. 339, 789 S.W.2d 453 (1990); *Ellis v. State*, 302 Ark. 597, 791 S.W.2d 370 (1990); *Sunbelt Couriers v. McCartney*, 31 Ark. App. 8, 786 S.W.2d 121, aff'd 798 S.W.2d 92 (1990); *Toney v. White*, 31

Ark. App. 34, 787 S.W.2d 246 (1990); *Flower v. Arkansas Pub. Serv. Comm'n*, 31 Ark. App. 155, 790 S.W.2d 183 (1990); *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991); *Grooms v. Myers*, 308 Ark. 324, 823 S.W.2d 901 (1992); *Butler v. State*, 311 Ark. 334, 842 S.W.2d 435 (1992); *State v. Mills*, 311 Ark. 363, 844 S.W.2d 324 (1992); *Malone v. Hines*, 36 Ark. App. 254, 822 S.W.2d 394 (1992); *State Farm Mut. Auto. Ins. Co. v. Thomas*, 312 Ark. 429, 850 S.W.2d 4 (1993); *Forrest City Mach. Works, Inc. v. Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993); *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993); *Walker v. State*, 314 Ark. 628, 864 S.W.2d 230 (1993); *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994); *State v. Pylant*, 319 Ark. 34, 891 S.W.2d 28 (1994); *Cheqnet Sys. v. Montgomery*, 322 Ark. 742, 911 S.W.2d 956 (1995); *Hamilton v. Villines*, 323 Ark. 492, 915 S.W.2d 271 (1996); *Farm Bureau Mut. Ins. Co. v. Farm Bureau Policy Holders & Members*, 323 Ark. 706, 918 S.W.2d 129 (1996); *State, Dep't of Fin. & Admin. v. Staton*, 325 Ark. 341, 942 S.W.2d 804 (1996); *State v. Wilcox*, 325 Ark. 429, 927 S.W.2d 337 (1996); *International Resource Ventures, Inc. v. Diamond Mining Co. of Am.*, 326 Ark. 765, 934 S.W.2d 218 (1996); *Higgins v. State*, 326 Ark. 1030, 936 S.W.2d 740 (1996); *Direct Gen. Ins. Co. v. Lane*, 328 Ark. 476, 944 S.W.2d 528 (1997); *Criswell v. Holliday*, 330 Ark. 762, 957 S.W.2d 181 (1997); *Dean v. Tallman*, 331 Ark. 127, 959 S.W.2d 41 (1998); *Southern Transit Co. v. Collums*, 333 Ark. 170, 966 S.W.2d 906 (1998); *Carson v. Weiss*, 333 Ark. 561, 972 S.W.2d 933 (1998), appeal dismissed sub nom. 351 Ark. 318, 92 S.W.3d 30 (2002); *Seeco, Inc. v. Hales*, 334 Ark. 307, 973 S.W.2d 818 (1998); *Morton v. Morton*, 61 Ark. App. 161, 965 S.W.2d 809 (1998); *Lee v. Konkel-Swaim*, 73 Ark. App. 429, 43 S.W.3d 767 (2001); *Ford Motor Co. v. Harper*, 351 Ark. 559, 95 S.W.3d 810 (2003); *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003); *Turner v. Farnam*, 82 Ark. App. 489, 120 S.W.3d 616 (2003); *Coulson Oil Co. v. Tully*, 84 Ark. App. 241, 139 S.W.3d 158 (2003); *Tyson*

Foods, Inc. v. Archer, 356 Ark. 136, 147 S.W.3d 681 (2004); *Southern College of Naturopathy v. State ex rel. Beebe*, 360 Ark. 543, 203 S.W.3d 111 (2005); *Helena-West Helena Sch. Dist. v. Monday*, 361 Ark. 82, 204 S.W.3d 514 (2005); *Asbury Auto. Used Car Ctr., L.L.C. v. Brosh*, 364 Ark. 386, 220 S.W.3d 637 (2005); *Bingham v. City of Jonesboro*, 89 Ark. App. 120, 201 S.W.3d 1 (2005); *Ray Townsend Farms, Inc. v. Smith*, 91 Ark. App. 22, 207 S.W.3d 557 (2005); *Israel v. Oskey*, 92 Ark. App. 192, 212 S.W.3d 45 (2005); *Johnson v. Langley*, 93 Ark. App. 214, 218 S.W.3d 363 (2005); *Smith v. Ark. Dep't of Human Servs.*, 93 Ark. App. 395, 219 S.W.3d 705 (2005); *Ball v. Phillips County Election Comm'n*, 364 Ark. 574, 222 S.W.3d 205 (2006); *Beverly Enters.-Ark., Inc. v. Circuit Court*, 367 Ark. 13, 238 S.W.3d 108 (2006); *Richard Harp Homes, Inc. v. Van Wyk*, 99 Ark. App. 424, 262 S.W.3d 189 (2007); *Sterne, Agee & Leach, Inc. v. Way*, 101 Ark. App. 23, 270 S.W.3d 369 (2007); *James v. Williams*, 372 Ark. 82, 270 S.W.3d 855 (2008); *Evans v. Blankenship*, 374 Ark. 104, 286 S.W.3d 137 (2008); *Int'l Paper Co. v. Clark County Circuit Court*, 375 Ark. 127, 289 S.W.3d 103 (2008); *Krass v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 245, 306 S.W.3d 14 (2009); *Kowalski v. Rose Drugs of Dardanelle, Inc.*, 2009 Ark. 524, 357 S.W.3d 432 (2009); *Cruise v. 451 Press, LLC*, 2010 Ark. App. 115, — S.W.3d —, 2010 Ark. App. LEXIS 108 (Feb. 3, 2010); *Ferguson v. Ferguson*, 2009 Ark. App. 549, 334 S.W.3d 425 (2009); *Ark. Dep't of Human Servs. v. Denmon*, 2009 Ark. 485, 346 S.W.3d 283 (2009); *Advocat, Inc. v. Heide*, 2010 Ark. App. 826, — S.W.3d —, 2010 Ark. App. LEXIS 859 (Dec. 8, 2010); *Kilman v. Kennard*, 2011 Ark. App. 454, — S.W.3d —, 2011 Ark. App. LEXIS 480 (June 22, 2011); *Phillippy v. ANB Fin. Servs., LLC*, 2011 Ark. App. 639, — S.W.3d —, 2011 Ark. App. LEXIS 665 (Oct. 26, 2011); *Carter v. Cline*, 2011 Ark. 474, — S.W.3d —, 2011 Ark. LEXIS 561 (Nov. 10, 2011); *Bancorpsouth Bank v. Shields*, 2011 Ark. 503, — S.W.3d —, 2011 Ark. LEXIS 582 (Dec. 1, 2011).

Rule 3. Appeal — How taken.

(a) *Mode of obtaining review.* The mode of bringing a judgment or order to the Supreme Court or Court of Appeals for review shall be by appeal. An appeal from any final order also brings up for review any intermediate order involving the merits and necessarily affecting the judgment. An appeal from an order disposing of a postjudgment motion under Rule 4(b)(1) brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from.

(b) *How taken.* An appeal shall be taken by filing a notice of appeal with the clerk of the circuit court that entered the judgment, decree, or order from which the appeal is taken. In counties where the county clerk serves as the

ex officio clerk of any division of the circuit court, the filing requirement shall be satisfied when the notice of appeal is filed with either the circuit clerk or the county clerk. Failure of the appellant or cross-appellant to take any further steps to secure review of the judgment or decree appealed from shall not affect the validity of the appeal or cross-appeal, but shall be ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or cross-appeal. If, however, the record on appeal has not been filed pursuant to Rule 5 of these rules, the circuit court in which the notice of appeal was filed may dismiss the appeal or cross-appeal upon petition of all parties to the appeal or cross-appeal accompanied by a joint stipulation that the appeal or cross-appeal is to be dismissed.

(c) *Joint or consolidated appeals.* If two or more persons are entitled to appeal and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in the appeal after filing separate, timely notices of appeal and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the Supreme Court upon its own motion or upon motion of a party.

(d) *Cross-appeals.* A cross-appeal may be taken by filing a notice of cross-appeal with the clerk of the circuit court that entered the judgment, decree or order being appealed.

(e) *Content of notice of appeal or cross-appeal.* A notice of appeal or cross-appeal shall:

- (i) specify the party or parties taking the appeal;
- (ii) designate the judgment, decree, order or part thereof appealed from;
- (iii) designate the contents of the record on appeal;
- (iv) state that the appellant has ordered the transcript, or specific portions thereof, if oral testimony or proceedings are designated, and has made any financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510(c);

(v) state whether the appeal is to the Court of Appeals or to the Supreme Court; and if to the Supreme Court, the appellant shall designate the applicable subdivision of Arkansas Supreme Court and Court of Appeals Rule 1S2(a), which gives the Supreme Court jurisdiction. This declaration shall be for the purpose of placing the case with one court or the other for preliminary administration. It shall not preclude the appellant from filing his or her brief pursuant to Arkansas Supreme Court and Court of Appeals Rules 4S3 and 4S4 in the alternative court if that is later determined by the appellant to be appropriate; and

(vi) state that the appealing party abandons any pending but unresolved claim. This abandonment shall operate as a dismissal with prejudice effective on the date that the otherwise final order or judgment appealed from was entered. An appealing party shall not be obligated to make this statement if the party is appealing an interlocutory order under Arkansas Rule of Appellate Procedure—Civil 2(a)(2)-(a)(13), Arkansas Rule of Appellate Procedure—Civil 2(c), or Arkansas Supreme Court and Court of Appeals Rule 6-9(a), or is appealing a partial judgment certified as final pursuant to Arkansas Rule of Civil Procedure 54(b).

(f) *Service of notice of appeal or cross-appeal.* A copy of the notice of appeal or cross-appeal shall be served by counsel for appellant or cross-appellant upon counsel for all other parties by any form of mail which requires a

signed receipt. If a party is not represented by counsel, notice shall be mailed to such party at his last known address. Failure to serve notice shall not affect the validity of the appeal.

(g) *Abbreviated record; statement of points.* If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his notice of appeal and designation a concise statement of the points on which he intends to rely on the appeal. (Amended July 7, 1986, effective September 15, 1986; amended September 19, 1988; amended December 4, 1989; adopted and amended July 10, 1995, effective January 1, 1996; amended November 18, 1996, effective March 1, 1997; amended December 9, 1996; amended June 23, 1997; amended June 30, 1997, effective for cases in which the record is lodged on or after September 1, 1997; amended December 4, 1997; amended January 28, 1999; amended June 7, 2001, effective July 1, 2001; amended March 13, 2003; amended February 10, 2005; amended June 3, 2010, effective July 1, 2010; amended May 24, 2012, effective July 1, 2012.)

Publisher's Notes. In the order announcing the 1998 amendment, the Court also commented that this rule was amended in 1997 to provide that a notice of appeal is invalid if it does not contain the statement that the transcript has been ordered and financial arrangements have been made with the court reporter, and that that provision has proven to be unsatisfactory.

Reporter's Notes to Rule 3 (1995): With the exception of one minor revision for purposes of clarity, this rule is identical to former Appellate Rule 3. The single change is the addition of the phrase "of these rules" in subdivision (b). The Reporter's Notes prepared in connection with former Appellate Rule 3 are set out below.

Reporter's Notes (as revised by the Court) to Rule 3: 1. Rule 3 establishes the procedures for initiating an appeal to the Arkansas Supreme Court. This rule makes certain changes in prior Arkansas procedures, but these should have little effect on the overall appellate process. The significant changes are found in Sections (e) and (f). In Section (e), it is provided that the notice of appeal shall contain a designation of the record, as opposed to prior practice which required a separate instrument, and shall contain a statement that the transcript has been ordered. The latter statement is intended to expedite appeals. In Section (f), the responsibility for serving notice of filing a notice of appeal or cross-appeal is placed upon counsel for appellant or cross-appellant as opposed to the clerk. The notice must be by a form of mail which requires a signed receipt.

2. For the appellee's procedure for designating additional parts of the record when the appellant does not designate the entire record, see Rule 6(b).

3. Rule 3 makes no attempt to define or affect the Arkansas Supreme Court's power in

matters of original jurisdiction as provided in *Ark. Stat. Ann.* 22-200 (e) (Repl. 1971). The Court's authority in this area is not in any way abridged or enlarged by this or any other rule adopted herein.

4. Rule 3 supersedes *Ark. Stat. Ann.* 27-2103, 27-2106.1, 27-2106.2 and 27-2110.1 (Repl. 1962).

Addition to Reporter's Notes, 1986 Amendment: Rule 3(b) is amended to incorporate provisions of statutes superseded when the rules of appellate procedure were adopted. The revised rule makes plain that the appellate court may, in its discretion, dismiss an appeal if the appellant has not taken the appropriate steps to secure review after filing the notice of appeal. However, if the record has not yet been filed in the appellate court, the trial court may dismiss the appeal upon stipulation of the parties or upon motion of either party. With respect to the latter provision, the rule represents a slight change in prior practice, under which dismissal in the trial court was by stipulation only and an appellee was required to file a partial record in the appellate court in order to move for dismissal there. See *Norfleet v. Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954). Leaving the matter to the trial court when no record on appeal has been filed is consistent with Rule 5, which permits the trial court to extend the time for filing the record, and is perceived as less expensive and cumbersome than the prior practice.

Addition to Reporter's Notes, 1988 Amendment: Under the amendment, which revises the last sentence of Rule 3(b), the trial court has authority to dismiss an appeal before the record is docketed in the appellate court only if all parties so stipulate and petition the trial court for dismissal. Absent such a stipulation, a party wishing to dismiss an appeal must file a partial record in the appel-

late court and move for dismissal there. See *Norfleet v. Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954). The amendment works a significant change in the rule, which, as amended in 1986, permitted the trial court to dismiss an appeal, prior to the docketing of the record, upon motion of a party.

Addition to Reporter's Notes, [March] 1997 Amendment: The last sentence of subdivision (e) has been revised to require an appellant to state, in the notice of appeal, that he or she not only has ordered the transcript or relevant portions thereof, but also has made the necessary financial arrangements with the court reporter for its preparation. By statute, the court reporter's duty to transcribe and certify the record "may be conditioned upon the payment, when requested by the court reporter, of up to fifty percent (50%) of the estimated cost of the transcript." Ark. Code Ann. § 16-13-510(c). The amendment is intended to eliminate delay that occurred under the previous version of the rule when a lawyer stated in the notice of appeal that he had ordered the transcript but the court reporter did not begin work because payment had not been received or financial arrangements made.

Addition to Reporter's Notes, [December] 1997 Amendment: The second and third sentences of subdivision (e) have been amended to take into account the situation in which no oral testimony or proceedings have been designated as part of the record on appeal. If this is the case, the notice must contain a statement that no oral testimony or proceedings have been designated.

The portion of the third sentence concerning the invalidity of the notice of appeal was added previously by the Supreme Court. See per curiam order of June 23, 1997. Under prior case law, the omission of the required statement from the notice of appeal was not necessarily fatal. Substantial compliance was sufficient unless the appellee was prejudiced by the appellant's failure to comply strictly with the rule. See *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996).

Court's Comments [1998 Amendment]: The sentence in subsection (e) rendering a notice of appeal invalid for violating requirements for ordering and paying for the transcript has been deleted from the rule. The reasons for this amendment are discussed in *Clayton v. Ideal Chemical and Supply Co.*, 335 Ark. 73, 977 S.W.2d 228 (1998).

Addition to Reporter's Notes, 2001 Amendment: In the third sentence of subdivision (b), the term "trial court" has been changed to "circuit court." Under Constitutional Amendment 80, the circuit courts are the "trial courts of original jurisdiction" in the state. Also, the references to the "clerk of the court" in subdivisions (b) and (d) have been

replaced with "clerk of the circuit court." In most cases, the circuit clerk serves as clerk of the circuit court and the notice of appeal will be filed in the circuit clerk's office. However, in some counties the county clerk is clerk of the circuit court with respect to probate matters. This division of labor is discussed in the 2001 Reporter's Note accompanying Rule 3 of the Rules of Civil Procedure.

Addition to Reporter's Notes, 2003 Amendment: The second and third sentences of subdivision (a) have been added. They also appear in Rule 2(b), as amended in 2003, and are reproduced here to provide additional notice to counsel.

Addition to Reporter's Notes, 2005 Amendment: Rule 3(b) has been amended. In some counties, the county clerk serves as the ex officio clerk of the probate division of the circuit court. Ark. Code Ann. § 14-14-502(b)(2)(B). Uncertainties have arisen in these circumstances about the effect of filing a notice of appeal with the wrong clerk. A sentence has been added to subsection (b) to make plain that, in these counties, a party complies with Rule 3 when the notice of appeal is file marked by either the circuit clerk or the county clerk. Similar clarifying language has been added to Rule of Civil Procedure 3(b) (filing a complaint), Rule of Civil Procedure 5(c)(1) (filing papers in general), and Administrative Order Number 2 (clerk's docket and filing).

Addition to Reporter's Notes, 2010 Amendment: Subdivision (e) has been reformatting into subparts, creating a check list to help parties in preparing their notices of appeal and cross-appeal. With one exception, no substantive change from the former rule has been made.

Subdivision (e) has been amended to require one new statement in every notice of appeal and notice of cross-appeal from a final order or judgment. Pursuant to new subpart (vi), the appealing party must state that the party is abandoning any pending but unresolved claim. This abandonment operates as a dismissal with prejudice of these stray claims.

This amendment will cure a recurring finality problem. Too often—after the parties have paid for the record, filed it, and filed all their briefs on appeal—the appellate court will discover that what appears to be a final order or judgment is not final because a pleaded claim, counterclaim, or cross-claim remains adjudicated. This kind of stray claim destroys finality and renders an otherwise final order or judgment unappealable. *E.g.*, *Ramsey v. Beverly Enters., Inc.*, 375 Ark. 424, 291 S.W.3d 185 (2009); *Rigsby v. Rigsby*, 340 Ark. 544, 11 S.W.3d 551 (2000); *Brasfield v. Murray*, 96 Ark. App. 207, 239 S.W.3d 551 (2006). These stray claims often appear to have been forgotten by the parties or abandoned even

though no order resolved them. It wastes parties' and courts' scarce resources to have two appeals in these situations.

A party taking an interlocutory appeal or cross-appeal authorized by the Arkansas Rules of Appellate Procedure, the Rules of the Supreme Court and Court of Appeals, or precedent, should not make this statement in the parties' notice. Nor is this statement required in a notice of appeal or cross-appeal from a judgment certified by the circuit court as final under Rule of Civil Procedure 54(b). In all these situations, which are in essence interlocutory appeals, some claims remain pending and viable in the circuit court during the appeal.

Addition to Reporter's Notes, 2012 Amendment: Arkansas Rules of Appellate Procedure-Civil 2(b) and 3(a) contained an ambiguity (same language in both rules) that could have been misconstrued as creating, under limited circumstances, a 180-day period in which to file the notice of appeal of a judgment (or intermediate order). Both rules stated that "[a]n appeal from an order disposing of a postjudgment motion under Rule 4 brings up for review the judgment and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from."

The reference in Rules 2(b) and 3(a) to orders disposing of postjudgment motions un-

der Rule 4 (without designation of a specific subsection under Rule 4) was intended to apply only to orders disposing of the postjudgment motions included in Rule 4(b)(1) (motions for judgment notwithstanding the verdict, motions to amend the court's findings of fact or to make additional findings, or any other motions to vacate, alter, or amend the judgment). However, the general reference to Rule 4 in Rules 2(b) and 3(a) could have been read as allowing appellate review of the original judgment (or intermediate order) 'brought up for review' by an order disposing of *any* postjudgment motion allowed under Rule 4. Since motions for extension of time to file a belated appeal are also included under Rule 4 (Rule 4(b)(3)), orders denying belated-appeal motions could have been considered to bring up for review the original judgment (or intermediate order). Because belated-appeal motions under Rule 4(b)(3) may be filed up to 180 days following the judgment, the effect would have been to create a 180-day period in which to appeal the original judgment (or intermediate order).

The amendment clarifies the original intent of Rules 2(b) and 3(a) by specifically limiting the postjudgment motions that bring up for review original judgments or intermediate orders to the postjudgment motions included in Rule 4(b)(1).

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

Recent Development: Final, Appealable Orders — Order Compelling Testimony in Exchange for Immunity (Thelman v. State of

Arkansas, — S.W.3d —, No. 06-1497, 2008 WL 4889529 (Ark. Nov. 13, 2008)), 61 Ark. L. Rev. 787.

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

U. Ark. Little Rock L.J. Survey — Civil Procedure, 10 U. Ark. Little Rock L.J. 105.

CASE NOTES

ANALYSIS

Amicus curiae.
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Amicus Curiae.

One coming before the Supreme Court in the posture of amicus curiae is bound by the questions which are properly before the court. Mears v. Little Rock Sch. Dist., 268 Ark. 30, 593 S.W.2d 42 (1980).

Contempt Citations.

The Supreme Court will review contempt citations under the rules and statutes pertaining to appeals, not by certiorari. Frolic Footwear, Inc. v. State, 284 Ark. 487, 683 S.W.2d 611 (1985); Arkansas Dep't of Human Servs. v. Shipman, 25 Ark. App. 247, 756 S.W.2d 930 (1988).

The proper procedure for the review of a citation holding a party's attorney in criminal contempt is for the attorney, not the party, to appeal the conviction. *Marsh v. Hoff*, 15 Ark. App. 272, 692 S.W.2d 270 (1985).

A contemnor, not a named party in the original proceeding but held in contempt of the court's orders, must file a notice of appeal in his own right, specifying that he is appealing from the order holding him in contempt. *Arkansas Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988).

Contents of Notice.

The appellant's failure to correctly designate in her notice of appeal the contents or the portions of the record upon which she intended to rely contravened subsections (e) and (g) of this rule. This caused a delay in the appeal and also shifted her burden to appellees to order and pay for the transcript so it could be lodged in the appellate court; thus, the appellees' motion to dismiss was granted. *Daffin v. Seymore*, 14 Ark. App. 163, 685 S.W.2d 539 (1985).

A notice of appeal must be judged by what it recites and not what it was intended to recite. It must state the parties appealing and the order appealed from with specificity, and persons not named as parties to the notice and orders not mentioned in it are not properly before the appellate court. *Arkansas Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988).

Naming only a commission as appellant in the notice of appeal was not sufficient. *Binns v. Heck*, 322 Ark. 277, 908 S.W.2d 328 (1995).

Where there was no intent on appellant's part to disregard subsection (e) of this rule, and where there was no prejudice to appellee occasioned by appellant's failure to designate the record or to state that the transcript had been ordered within the 30-day period, and the Designation of the Record, which designated the pleadings, motions, and order, was filed two weeks after the notice of appeal, and where the appeal was from an order of summary judgment and no testimony was involved, there was substantial compliance with subsection (e) of this rule. *Rogers v. Tudor Ins. Co.*, 325 Ark. 226, 925 S.W.2d 395 (1996).

A notice of appeal was sufficient to vest jurisdiction over appellees and over an order dismissing them from the case even though the notice of appeal did not specifically name them or the interlocutory, partial summary-judgment orders by which they were dismissed from the case. *Philip v. Jefferson Hosp. Ass'n*, 69 Ark. App. 395, 13 S.W.3d 224 (2000).

Section 9-27-341(b)(3)(B)(ix)(d)(2) clearly requires that the pleadings and testimony from hearings prior to a parental rights termination hearing are to be incorporated by

reference into the trial record, and there is no language in the statute that can be interpreted to mean that those proceedings must also be designated as a part of the appeal record; such an interpretation of the statute would be inconsistent with subsection (e) of this rule, which allows an appellant to designate in a notice of appeal only "specific portions" of oral testimony or proceedings as a part of the record on appeal. *Cobbs v. Ark. Dep't of Human Servs.*, 87 Ark. App. 188, 189 S.W.3d 487 (2004).

District's notice of appeal failed to designate the contents of the record on appeal and failed to contain any statement that it had ordered the transcript or made financial arrangements; thus, it appeared that the district's notice of appeal failed to comply with subsection (e) of this rule. *Larry v. Grady Sch. Dist.*, 362 Ark. 65, 207 S.W.3d 451 (2005).

Where appellant misidentified the date of the order it was appealing from, but appellant's arguments were clearly directed at a June 12 order, appellant's failure to designate the June 12 judgment in its notice of appeal was not fatal to its appeal of that judgment. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 372 Ark. 190, 272 S.W.3d 91 (2008).

In a termination of parental rights case, a father's appeal from an order of child support was not heard on appellate review because a guardianship/support order was not designated as one of the issues appealed from; the guardianship/support order was independent of the order terminating parental rights. *Hall v. Ark. Dep't of Human Servs.*, 101 Ark. App. 417, 278 S.W.3d 609 (2008).

In a case involving the disposition of county property in which a taxpayers group appealed a county court's entry of summary judgment in favor of a county judge, there was no final appealable order under Ark. R. Civ. P. 54(b) as the grant of summary judgment did not dispose of the complaint against all defendants. There was a remaining defendant that had been served, and the group failed to include a statement in its notice of appeal that it was abandoning any pending but unresolved claim, which would have operated as a dismissal with prejudice of its claim against that defendant. *Searcy County Counsel for Ethical Gov't v. Hinchey*, 2011 Ark. 533, — S.W.3d —, 2011 Ark. LEXIS 618 (Dec. 15, 2011).

Cross-Appeal.

Ordinarily, the failure to file a notice of cross-appeal would end the matter, but since the appellee did not seek any relief it did not receive in the lower court, the appellate court addressed the matter. *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993).

A notice of cross-appeal is necessary when an appellee seeks something more than it

received in the lower court. *Hasha v. City of Fayetteville*, 311 Ark. 460, 845 S.W.2d 500 (1993).

Where granddaughter sought relief she failed to obtain in the circuit court, she was requesting something more than she received in the lower court and a notice of cross appeal was necessary; however, since the record did not indicate that a notice of cross appeal was ever filed, the appellate court was without jurisdiction to consider the granddaughter's points on cross appeal. *Hoffman v. Gregory*, 361 Ark. 73, 204 S.W.3d 541 (2005).

Because a decedent's wife failed to file a notice of cross-appeal in a probate matter, the appellate court was without jurisdiction to consider the wife's argument that the trial court's finding that a joint will was a binding contract should have been vacated because it was unnecessary and incorrect. *Dotson v. Dotson*, 2009 Ark. App. 819, — S.W.3d —, 2009 Ark. App. LEXIS 1050 (2009).

In a legal malpractice action, counsel failed to file an effective notice of cross-appeal from the order denying costs and, therefore, the appellate court lacked jurisdiction to consider counsel's cross-appeal. *Lindsey v. Green*, 2010 Ark. 118, — S.W.3d —, 2010 Ark. LEXIS 150 (Mar. 11, 2010).

Dismissal Sua Sponte.

Pursuant to subsection (b) of this rule, a trial court cannot dismiss a notice of appeal, whether timely or untimely, without a proper stipulation of the parties or a motion to dismiss filed by the appellant, as it is not within the authority of a trial court to pass on the validity of a notice of appeal and dismiss it sua sponte; at the least, a partial record suitable for tender to the appellate court should be prepared whereby the appellant may tender the record and allow the appellate court to determine whether the appeal should be lodged. *Barnes v. State*, 322 Ark. 814, 912 S.W.2d 405 (1995).

Effect of 1997 Amendments.

The first 1997 amendment to subsection (e) of this rule required that the notice of appeal state that financial arrangements had been made with the court reporter; the second amendment to subsection (e) of this rule provided that a notice of appeal is invalid if it does not include the statement regarding financial arrangements with the court reporter; the last amendment added to the Reporter's Notes a statement that the "invalidity" language of the second amendment means that substantial compliance is not the standard for saving a notice of appeal when the financial-arrangement language is omitted. *Green v. Williford*, 331 Ark. 533, 961 S.W.2d 766 (1998).

Failure to File or Serve Notice.

Where there was no notice of a cross appeal by the appellee, the Supreme Court would not consider the issues raised in the cross appeal. *Elcare, Inc. v. Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980).

An appeal would not be dismissed merely because appellee was never served with the "Designation of the Record" which appellant filed along with the "Notice of Appeal" since subsection (f) of this rule provides that validity of appeal is not affected by failure to serve notice. *Wise v. Barron*, 280 Ark. 202, 655 S.W.2d 446 (1983).

Financial Arrangements.

The fact that a notice of appeal may be invalid due to lack of a "financial arrangements" statement will not be considered fatal to the appeal if the record, including the trial transcript, has been lodged with the clerk in a timely manner; prior to the appellant's lodging of the record on appeal, a challenge to the notice of appeal may be made by filing a motion to dismiss the appeal accompanied by a partial record. *Green v. Williford*, 331 Ark. 533, 961 S.W.2d 766 (1998).

While an appeal was not rendered void by the failure of the notice of appeal to provide for the making of financial arrangements with the court reporter, such failure made it impossible for the court to expedite this matter. *Valley v. Bogard*, 341 Ark. 302, 20 S.W.3d 271 (2000).

Interlocutory Decisions.

Appellant's notice of appeal from a trial court's final judgment was not ineffective to appeal the trial court's earlier dismissal of a funeral services company from his lawsuit as, until the entire case was disposed of, there was no final order to appeal pursuant to Ark. R. App. P. Civ. 2(a)(11) and Ark. R. Civ. P. 54(b). An appeal from a final order also brought up for review any intermediate order involving the merits and necessarily affecting the judgment, pursuant to Ark. R. App. P. Civ. 2(b) and subsection (a) of this rule. *King v. French*, 2011 Ark. App. 257, — S.W.3d —, 2011 Ark. App. LEXIS 271 (Apr. 6, 2011).

Notice of Appeal.

Although petitioner may have mailed a copy of the notice of appeal to the circuit judge, the circuit judge was not obligated to determine whether the original notice of appeal was received by the clerks, since this rule requires that a notice of appeal be filed with the circuit clerk. *Key v. State*, 297 Ark. 111, 759 S.W.2d 567 (1988).

Notice of appeal held inadequate. *Matthews v. Dodrill*, 297 Ark. 535, 763 S.W.2d 93 (1989).

While it is proper for two or more parties to file a joint or consolidated appeal, the notice of appeal must specify the party or parties tak-

ing the appeal. *Ozark Acoustical Contractors, Inc. v. National Bank of Commerce*, 301 Ark. 472, 786 S.W.2d 813 (1990).

Where the notice of appeal failed to designate the judgment or order appealed from, the notice was deficient, but not fatal; it was the fact the notice was filed prematurely which rendered it a nullity. *Jasper v. Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 664 (1991).

Subsection (g) of this rule contains additional notice requirements if an abbreviated record is contemplated; where this rule was not followed by appellant client, the lawyer was not put on notice that an abbreviated record was involved. *Johnson v. Simes*, 361 Ark. 18, 204 S.W.3d 58 (2005).

Appellate court denied wife's motion to dismiss the third and fourth notices of appeal filed by husband as the notices of appeal designated the hearings and the proceedings from which he had appealed and the husband filed the record within the time granted by the extension. *Conlee v. Conlee*, 366 Ark. 398, 235 S.W.3d 899 (2006).

Under subsection (e) of this rule, the appellate court did not have jurisdiction to entertain the father's argument pertaining to custody as he made no mention in notice of appeal of divorce decree, in which the trial court granted custody of the child to the mother. *Rawe v. Rawe*, 100 Ark. App. 90, 264 S.W.3d 549 (2007).

In this boundary line dispute case, at the time the individual filed his first notice of appeal, he knew that the trial court had directed the landowners to submit a legal description of the property within 45 days, and by filing his notice of appeal and lodging the record, the individual himself truncated the proceedings in the trial court, and it was the individual's decision to take an appeal from a non-appealable order and the individual was not to be heard to complain of error and benefit from his own improper or untimely conduct; while the trial court's order did not contain the required legal description, the trial court ordered the description to be submitted and clearly contemplated further action, which the individual thwarted by filing his inappropriate notice of appeal, and thus the court rejected the claim that the trial court erred in allowing the individuals to submit the legal description at a later date. *Myers v. Yingling*, 372 Ark. 523, 279 S.W.3d 83 (2008).

As the accused failed to have the circuit court reduce the contempt order to writing as per subsection (e) of this rule, and as an order requiring the accused's testimony in exchange for a grant of use immunity was not itself a final appealable order, the accused's appeal had to be dismissed. *Thelman v. State*, 375 Ark. 116, 289 S.W.3d 76 (2008).

Failure to lodge the record was due to the

dilatory actions of the husband's attorney, because while the notice of appeal stated that the attorney had ordered the transcript, it was apparent that she failed to provide the court reporter with a copy of the notice of appeal or otherwise inform court reporter that she needed the transcript until just before the original deadline to lodge the record. *Eggstein v. Eggstein*, 2009 Ark. 262, 308 S.W.3d 144 (2009).

Because an attorney's notice of appeal failed to specify two earlier orders on the merits of a challenged guardianship, the only issue properly before the court of appeals was the circuit court's denial of the attorney's motion for attorney's fees; the attorney's notice of appeal perfected an appeal from the fee order only and nothing else, and the attorney's inclusion of the stock language "an appeal from all of the circuit court's rulings that shaped the judgment" did not bring up the circuit court's earlier orders about the merits of the guardianship. In re *Estate of Reimer*, 2010 Ark. App. 41, — S.W.3d —, 2010 Ark. App. LEXIS 46 (2010).

Appellate court did not have jurisdiction to hear appellants' challenge to the trial court's award of attorneys' fees as the order awarding attorneys' fees was entered after entry of the judgment; thus, the issue of attorneys' fees was a collateral matter, requiring the filing of a notice of appeal from the fee order, which was not done. Pursuant to subsection (e) of this rule, orders not mentioned in a notice of appeal were not properly before the appellate court for review. *Spill Responders, Inc. v. Felts*, 2011 Ark. App. 267, — S.W.3d —, 2011 Ark. App. LEXIS 274 (Apr. 6, 2011).

Dismissal of the hunter's appeal after the Arkansas Game and Fish Commission and its director canceled hunting season after it had already been approved was appropriate because the notice of appeal did not substantially comply with subsection (e) of this rule. There could be no compliance with that subsection when the notice of appeal declared that the necessary financial arrangements had been made when, in reality, they had not been. *Ark. R. App. P. Civ. 6(b)*; the hunter's counsel failed to make the necessary financial arrangements with the court reporter as represented in his notice of appeal until more than two months later after he had filed a motion for extension of time. *Ark. R. App. P. Civ. 5(b)(1)(D)*. *Clark v. Ark. Game & Fish Comm'n*, 2011 Ark. 279, — S.W.3d —, 2011 Ark. LEXIS 250 (June 23, 2011).

Reviewing court limited its review to the June 23, 2011 order, because orders not mentioned in the notice of appeal were not properly before the reviewing court. *McKenzie v. Pierce*, 2012 Ark. 190, — S.W.3d —, 2012 Ark. LEXIS 212 (May 3, 2012).

Defendants failed to appeal from an order

awarding plaintiff attorney fees either by a separate notice of appeal or by designating it in the notice of appeal they filed; hence, the issue regarding attorney fees was not properly before the appellate court under subdivision (e)(ii) of this rule. *Entertainer, Inc. v. Duffy*, 2012 Ark. 202, — S.W.3d —, 2012 Ark. LEXIS 229 (May 10, 2012).

Party Taking Appeal.

Property owner failed to substantially comply with subsection (e) of this rule because the notice of appeal from an annexation challenge was brought in the name of a neighboring city that had sought to intervene in the owner's action below, and this error was not a scrivener's error. *Finney v. Meyer*, 2010 Ark. App. 403, — S.W.3d —, 2010 Ark. App. LEXIS 433 (May 12, 2010).

Record on Appeal.

On review of a termination hearing, the court denied a motion filed by the Arkansas Department of Human Services (ADHS) to order appellant mother to abstract portions of the record that she did not include in her brief as the ADHS was free to designate additional parts of the record. *Rawles v. Ark. Dep't of Human Servs.*, 89 Ark. App. 331, 202 S.W.3d 547 (2005).

Under subsection (e) of this rule and Ark. R. App. P. Civ. 6, if the store, as cross-appellant, wanted portions of the record brought up on appeal in addition to those provided for by appellant because such portions were necessary for its cross-appeal, it was incumbent on the store to designate such portions and to make financial arrangements to obtain the records. It was not appellant's burden to anticipate the store's argument on cross-appeal and to prepare, at her expense, the record wanted by the store. *Darrough v. Tobacco Superstore, Inc.*, 374 Ark. 63, 285 S.W.3d 626 (2008).

Trial court did not err, for purposes of subsection (e) of this rule, in granting an extension of time to file the record, given that (1) the former attorney of the company, owner, and related individual did nothing beyond filing the notice of appeal without having ordered the transcript, but present counsel did everything he could to perfect the appeal, including communicating with the court reporter and filing an appropriate motion for an extension of time, and (2) the landowner did not explain how it was prejudiced by the failure to timely order the transcript. *Shamlin v. Quadrangle Enters.*, 101 Ark. App. 164, 272 S.W.3d 128 (2008).

Scope of Appeal.

Where the Arkansas Education Association filed an amicus curiae brief in an action challenging a county ordinance governing the payment of interest on school taxes to the county general fund, the association could not

argue on appeal that the chancellor was wrong in allowing the assessor to recover for salaries and necessary expenses, since the appellee school districts did not cross appeal from that part of the chancellor's decision, and therefore the issue was not properly before the court on appeal. *Mears v. Little Rock Sch. Dist.*, 268 Ark. 30, 593 S.W.2d 42 (1980).

Substantial Compliance.

Where appellants stated at the time they filed notice of appeal from award of attorney's fees added after the trial of the case that they would request trial transcript and anticipated that they probably would not need the transcript at that time, the appellants designated the entire record as a record on appeal because of unsuccessful attempts to obtain an agreed record, such actions were in good faith and substantially complied with this rule; accordingly, failure to strictly comply with the requirement that the notice of appeal contain a statement that the transcript has been ordered is not jurisdictional and will not result in dismissal of the appeal. *Brady v. Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 353 (1981).

Irregularities in following rules of appellate procedure, other than failure to file timely notice of appeal and to lodge record, were not fatal. *Henderson Methodist Church v. Sewer Imp. Dist. No. 142*, 294 Ark. 188, 741 S.W.2d 272 (1987).

When equivocal language in the notice of appeal is coupled with a similar uncertainty in the matter of ordering the transcript, then substantial compliance with subsection (e) of this rule is lacking. *DeViney v. State*, 299 Ark. 471, 772 S.W.2d 607 (1989).

Substantial compliance with this rule is not sufficient; the failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995).

The purpose behind the financial arrangements language of the rule was satisfied by the tendering of the record prior to submission of the appellee's motion to dismiss and, therefore, the motion was moot. *Quality Fixtures, Inc. v. Multi-Purpose Facilities Bd.*, 334 Ark. 209, 970 S.W.2d 815 (1998).

Where the appellants lodged the record with the clerk and paid the amount that the court reporter required before the submission to the court of the appellee's motion to dismiss for failure to include a statement that financial arrangements had been made with the court reporter for preparation of the transcript, the purpose underlying the rule was satisfied and, therefore, the court would deny the motion to dismiss. *Clayton v. Ideal Chem. & Supply Co.*, 335 Ark. 73, 977 S.W.2d 228 (1998).

Error in mother's notice of appeal as to the date of the appealed order of a change in custody of her children did not deprive the

court of jurisdiction as the notice was timely filed and also clearly included when the order was filed of record; thus, the error was not fatal to the appeal. *Henley v. Medlock*, 97 Ark. App. 45, 244 S.W.3d 16 (2006).

Although a notice of appeal failed to comport with subsection (e) of this rule because it did not designate the record, did not contain a statement of financial arrangements, and did not designate which court was being appealed to, the notice was not fatally deficient because it was timely filed and substantially complied with the rule. *Jennings v. Architectural Prods.*, 2010 Ark. App. 413, — S.W.3d —, 2010 Ark. App. LEXIS 440 (May 12, 2010).

Supersession.

Section 16-67-310 has been superseded by subsection (e) of this rule insofar as the rule requires designation of the record and a statement that the transcript has been ordered to be included in the notice of appeal since it was the intention of the legislature and the Supreme Court that the Rules of Appellate Procedure would prevail in the event of a conflict with a statute not specifically superseded. *Brady v. Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 358 (1981).

Time for Filing Notice.

Contention that notice of appeal was not timely filed where considerably more than 30 days had elapsed between the docket entry and the notice of appeal was without merit since the court's own docket entry recited that appellee's counsel would prepare the decree, thus challenging the argument that both sides were under the impression that the docket entry was to be the final and only judgment in the case, and since the crucial date is the date the judgment is filed with the clerk. *Hurst v. Hurst*, 269 Ark. 778, 602 S.W.2d 137 (1980).

There is nothing to indicate any departure from the well-established view of fixing the time for filing notice of appeal from the date on which the judgment, decree or order is filed with the clerk was intended by the language of this rule. *Hurst v. Hurst*, 269 Ark. 778, 602 S.W.2d 137 (1980).

Transcript Statement.

The trial court erred in not dismissing the appeal where appellant failed to follow the requirement of subsection (e) of this rule that the notice of appeal contain a statement that designated portions of transcript had been ordered from court reporter. *Appleton-Rice v. Crumpler*, 279 Ark. 450, 655 S.W.2d 1 (1983); *McElroy v. American Medical Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989).

Where although the notice of appeal did not state that the transcript had been ordered, it was in fact ordered and no extension of time was ever needed or requested, and the record was timely filed with the clerk of this court,

the purpose of the requirement in subsection (e) of this rule that the notice of appeal contained a statement that the transcript has been ordered was not frustrated and appellee was not prejudiced in this regard so as to require dismissal of the appeal. *Wise v. Barron*, 280 Ark. 202, 655 S.W.2d 446 (1983).

Where the appellant's notice of appeal made no mention of having ordered a transcript of the testimony, and the appellant failed to order a transcript of testimony seven months after the notice of appeal was filed, the appeal was dismissed for failure to comply with subsection (e) of this rule. *Phillips v. Marianna Ford Tractor, Inc.*, 290 Ark. 75, 716 S.W.2d 763 (1986).

Where there was a misunderstanding between the appellant and the court reporter about whether he had ordered the transcript, but the transcript was eventually ordered on the reporter's terms with respect to payment, and there was no showing of any prejudice to the appellee resulting from the delay in getting the transcript ordered, the appellant substantially complied with subsection (e) of this rule. *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986).

Where appellant's timely notice of appeal failed to specifically state in the notice that the transcript had been ordered but counsel acted promptly in ordering the transcript, and his failure to mention he had ordered it in his notice of appeal in no way delayed the appellate proceeding or frustrated the purpose of subsection (e) of this rule, a motion to dismiss for failure to comply with subsection (e) of this rule would be denied. *Phillips v. Lavalley*, 293 Ark. 364, 737 S.W.2d 652 (1987).

Where appellants affirmatively, but falsely, stated that the transcript had been ordered when in fact it had not, and such misstatement was not promptly corrected by a timely order for the transcript, appellants' actions were calculated to cause a material delay in the appeal process and constituted a failure to substantially comply with subsection (e) of this rule. *McElroy v. American Medical Int'l, Inc.*, 297 Ark. 527, 763 S.W.2d 89 (1989).

Subsection (e) of this rule was intended to require the appellant to specifically order the transcript, and the mere recitation in the notice of appeal that appellant "hereby requests" court officials to take appropriate action is not the definitive act contemplated by the provision. *DeViney v. State*, 299 Ark. 471, 772 S.W.2d 607 (1989).

Even though the trial court, upon finding that a reporter's transcript of evidence or proceedings has been ordered by appellant and upon a further finding that an extension is necessary for the inclusion in the record of evidence or proceedings stenographically reported, may extend the time for filing the record on appeal, where neither the partial

record filed nor trial court's order extending the time to file the record indicated that the trial court made a finding that the transcript had been ordered, writ of certiorari to complete the record would be denied. *Watson v. State*, 324 Ark. 351, 920 S.W.2d 840 (1996).

Untimely Filing of Record.

Where the petitioner's notice of appeal did not contain a statement that the transcript had been ordered as required by subsection (e) of this rule, and more than two months later the petitioner obtained an extension of time to docket the appeal, the extension of time for filing the record was in violation of ARAP 5(b), because the court did not make a finding that the reporter's transcript had been ordered. *Alexander v. Beaumont*, 275 Ark. 357, 629 S.W.2d 300 (1982).

Void Order.

County court lacked subject-matter jurisdiction over plaintiff's claims based on the federal constitution, and its judgment in that regard was null and void; as the citizen based her appeal in circuit court on a void order from the county court, the circuit court's judgment was also void. *Villines v. Harris*, 362 Ark. 393, 208 S.W.3d 763 (2005).

Cited: *Daniels v. Daniels*, 269 Ark. 588, 599 S.W.2d 748 (1980); *Meyer v. State*, 272 Ark. 385, 614 S.W.2d 665 (1981); *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983); *Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *Hammock v. Grayson*, 284 Ark. 367, 681 S.W.2d 352 (1984); *Woods v. State*, 287

Ark. 212, 697 S.W.2d 890 (1985); *Newton County v. Davison*, 289 Ark. 109, 709 S.W.2d 810 (1986); *Ragan v. Venhaus*, 289 Ark. 266, 711 S.W.2d 467 (1986); *Jones v. Goodson*, 298 Ark. 434, 768 S.W.2d 33 (1989); *Johnson v. State*, 299 Ark. 223, 772 S.W.2d 322 (1989); *F & M Bank v. Deason*, 300 Ark. 30, 775 S.W.2d 909 (1989); *Salamo v. Supreme Court Comm. on Professional Conduct*, 301 Ark. 348, 783 S.W.2d 858 (1990); *Markham v. State*, 303 Ark. 438, 798 S.W.2d 58 (1990); *Pledger v. Illinois Tool Works, Inc.*, 306 Ark. 134, 812 S.W.2d 101 (1991), cert. denied 502 U.S. 958, 112 S. Ct. 418, 116 L. Ed. 2d 439 (1991); *Henry v. Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992); *Burnett v. Burnett*, 313 Ark. 599, 855 S.W.2d 952 (1993); *McAdams v. Automotive Rentals, Inc.*, 319 Ark. 254, 891 S.W.2d 52, cert. denied 516 U.S. 844, 116 S. Ct. 132, 133 L. Ed. 2d 80 (1995); *Daniel v. State*, 64 Ark. App. 98, 983 S.W.2d 146 (1998); *George v. Ark. Dep't of Human Servs.*, 88 Ark. App. 135, 195 S.W.3d 399 (2004); *Ark. HHS v. Storey*, 372 Ark. 23, 269 S.W.3d 803 (2007); *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007); *Wilhelms v. Sexton*, 102 Ark. App. 46, 280 S.W.3d 565 (2008); *Second Injury Fund v. Durham*, 2010 Ark. App. 819, — S.W.3d —, 2010 Ark. App. LEXIS 861 (Dec. 8, 2010); *Racine v. Nelson*, 2011 Ark. 50, — S.W.3d —, 2011 Ark. LEXIS 40 (Feb. 9, 2011); *Lancaster v. Red Robin Int'l, Inc.*, 2011 Ark. App. 706, — S.W.3d —, 2011 Ark. App. LEXIS 758 (Nov. 16, 2011).

Rule 4. Appeal — When taken.

(a) *Time for filing notice of appeal.* Except as otherwise provided in subdivisions (b) and (c) of this rule, a notice of appeal shall be filed within thirty (30) days from the entry of the judgment, decree or order appealed from. A notice of cross-appeal shall be filed within ten (10) days after receipt of the notice of appeal, except that in no event shall a cross-appellant have less than thirty (30) days from the entry of the judgment, decree or order within which to file a notice of cross-appeal. A notice of appeal filed after the circuit court announces a decision but before the entry of the judgment, decree, or order shall be treated as filed on the day after the judgment, decree, or order is entered.

(b) *Extension of time for filing notice of appeal.*

(1) Upon timely filing in the circuit court of a motion for judgment notwithstanding the verdict under Rule 50(b) of the Arkansas Rules of Civil Procedure, a motion to amend the court's findings of fact or to make additional findings under Rule 52(b), a motion for a new trial under Rule 59(a), or any other motion to vacate, alter, or amend the judgment made no later than 10 days after entry of judgment, the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. However, if the circuit court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed

denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.

(2) A notice of appeal filed before disposition of any of the motions listed in paragraph (1) of this subdivision shall be treated as filed on the day after the entry of an order disposing of the last motion outstanding or the day after the motion is deemed denied by operation of law. Such a notice is effective to appeal the underlying judgment, decree, or order. A party who also seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice, complying with Rule 3(e). No additional fees will be required for filing an amended notice of appeal.

(3) Upon a showing of failure to receive notice of the judgment, decree or order from which appeal is sought, a showing of diligence by counsel, and a determination that no party would be prejudiced, the circuit court shall, upon motion filed within 180 days of entry of the judgment, decree, or order, extend the time for filing the notice of appeal for a period of fourteen (14) days from the day of entry of the extension order. Notice of any such motion shall be given to all other parties in accordance with Rule 5 of the Arkansas Rules of Civil Procedure. Expiration of the 180-day period specified in this paragraph does not limit the circuit court's power to act pursuant to Rule 60 of Arkansas Rules of Civil Procedure.

(c) *Exception for election cases.* If a statute of this State pertaining to elections prescribes a time period for taking an appeal, the period so prescribed shall apply in any case subject to the statute.

(d) *When judgment is entered.* A judgment or order is entered within the meaning of this rule when it is filed in accordance with Administrative Order No. 2(b). (Amended July 7, 1986, effective September 15, 1986; amended December 21, 1987, effective March 14, 1988; amended November 8, 1993, effective January 1, 1994; amended July 10, 1995; adopted and amended July 10, 1995, effective January 1, 1996; amended January 22, 1998; amended January 28, 1999; amended January 27, 2000; amended February 1, 2001; amended June 7, 2001, effective July 1, 2001; amended March 13, 2003; amended January 22, 2004; amended May 25, 2006.)

Court's Comment to Rule 4(f) (1995): Rule 4(f) makes clear that a notice of appeal filed on the same day as the judgment, decree, or order is effective, even though filed on that day *before* the judgment, decree or order appealed from. The new rule overrules the holdings in *Lawrence Bros., Inc. v. R.J. "Bob" Jones Excavating Contractor, Inc.*, 318 Ark. 328, 884 S.W.2d 620 (1994) (per curiam) and *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992) (per curiam), to the extent those holdings invalidate notices of appeal filed on the same day but before the judgment, decree, or order appealed from.

Reporter's Notes to Rule 4 (1995): This rule tracks former Appellate Rule 4 without change. The Reporter's Notes prepared in connection with former Appellate Rule 4 are set out below.

Reporter's Notes (revised by the Court) to Rule 4: 1. Rule 4 consolidates various superseded Arkansas statutes concerning the time for taking an appeal under prior law into one rule. Section (a) follows

superseded *Ark. Stat. Ann.* 27-2106.1 (Repl. 1962) insofar as the time for filing a notice of appeal is concerned. A notice of cross-appeal must be filed within ten days after receipt of the notice of appeal, but in no event shall the cross-appellant have less than thirty days from entry of judgment within which to file his notice.

2. Section (b) does not follow the second paragraph of Rule 4 of the Federal Rules of Appellate Procedure. It was believed that the federal rule permits excessive delay with respect to post-judgment motions that might be filed but not acted upon promptly. Consequently, Sections (b), (c) and (d) preserve the procedure that was prescribed by Act 123 of 1963. See superseded *Ark. Stat. Ann.* 27-2106.3 et seq. (Supp. 1977); *St. Louis S.W. Ry. v. Farrell*, 241 Ark. 707, 409 S.W.2d 341 (1966).

3. Under Federal Rule 4, the trial court is empowered to extend the time for filing a notice of appeal upon a showing of excusable neglect. No such provision is included in Rule

4 for the reason that Arkansas has long considered the filing of a notice of appeal as jurisdictional and unless timely filed, there can be no appeal. *White v. Avery*, 226 Ark. 951, 295 S.W.2d 364 (1956). The Committee saw no need to change this settled rule of law.

4. Section (e) incorporates in the rule the definition of the "entry" of a judgment that has been followed under superseded *Ark. Stat. Ann.* 27-2106.1 (Repl. 1962); *Norfleet v. Norfleet*, 223 Ark. 751, 268 S.W.2d 387 (1954).

Addition to Reporter's Notes, 1986 Amendment: Rule 4(a) is amended to empower the trial court to extend the time for filing a notice of appeal when the party has not received notice of the entry of the judgment or order from which he seeks to appeal. The amendment represents a narrow exception to the rule that the filing of a notice of appeal is jurisdictional and, unless timely filed, there can be no appeal. *White v. Avery*, 226 Ark. 951, 291 S.W.2d 364 (1956). The change was deemed necessary to ensure fairness when counsel has not received notice of the entry of the judgment or other appealable order. *Cf. Karam v. Halk*, 260 Ark. 36, 537 S.W.2d 797 (1976). Although under longstanding Arkansas custom opposing counsel have been given an opportunity to approve a judgment or order prepared by opposing counsel, circumstances have arisen where counsel did not receive that opportunity and did not otherwise receive notice that a judgment had been entered.

The reference in Rule 4(b) to Rule 59(f), Ark. R. Civ. P., was rendered obsolete when Rule 59(f) was deleted in 1983. *See* Reporter's Note, Rule 59(f). Moreover, a new Rule 59(f) was added in 1984, thus making the reference in Rule 4(b) even more confusing. This amendment deletes the language referring to Rule 59(f).

Addition to Reporter's Notes, 1988 Amendment: Sections (c) and (d) of Rule 4 are amended significantly in an effort to simplify Arkansas appellate practice. The amended provisions are modeled on Rule 4 of the Federal Rules of Appellate Procedure, though the federal practice has not been followed in all particulars. When the Arkansas Rules of Civil Procedure were promulgated in 1979, the federal approach with respect to judicial action on posttrial motions was not adopted for fear of excessive delay. It is now apparent, however, that precisely the same sort of delay occurs regularly under the more complex Arkansas rule, which also has become a trap for the unwary. The Arkansas practice has been further complicated by decisions construing Rule 4 in such a manner as to impose additional requirements not found on the face of the rule. *E.g., Brittenum & Assocs. v. Mayall*, 286 Ark. 427, 692 S.W.2d 248 (1985). Thus, the 1988 amendment fol-

lows the more simplified procedure established in the federal rule, but adds a 30-day "window" for judicial action on posttrial motions to prevent problems with excessive delay. Under Rule 4(c), a motion is deemed denied if the trial court neither grants nor denies the motion within 30 days of its filing, and, under Rule 4(d), the time for filing the notice of appeal begins to run at the end of that 30-day period. If, however, an order granting or denying the motion is acted upon within the 30-day period, the time for filing the notice of appeal begins to run upon entry of the order.

Further, the 1988 amendment expands from 10 to 30 days the time period in Rule 4(d) for filing the notice of appeal when a posttrial motion has been made. This change, which makes consistent the time periods found in Rule 4(a) and 4(d), should eliminate confusion as to the time for filing the notice of appeal. Moreover, the amendment works an important change in prior Arkansas law. Because of the shorter time period contained previously in Rule 4(d), it was possible for an appellant to miss the 10-day deadline but still file a notice of appeal from the order denying the posttrial motion by complying with the 30-day period provided in Rule 4(a). *E.g., Cornett v. Prather*, 290 Ark. 262, 718 S.W.2d 433 (1986). In that event, the appellant could challenge only the trial court's action with respect to the posttrial motion and could not attack other errors underlying the judgment. *Id.* By establishing a uniform 30-day period for filing the notice of appeal, amended Rule 4(d) eliminates this possibility and is thus consistent with Rule 5(b), which provides that an appeal from an order disposing of a posttrial motion under Rule 4 "brings up for review the judgment, decree and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from."

Rules 50(b), 52(b), and 59(b), referred to in subsection (b), are probably references to ARCP 50(b), 52(b) and 59(b).

Addition to Reporter's Notes, 1998 Amendment: Subdivision (e) has been amended to reflect case law pertaining to the filing of judgments, decrees, and orders. The second sentence of the revised rule provides that a judgment, order, or decree is filed when the clerk stamps or marks the date and time of filing thereon, along with the word "filed." *See* Arkansas Dept. of Human Services v. Hardy, 316 Ark. 119, 871 S.W.2d 352 (1994); *Schaefer v. McGhee*, 284 Ark. 370, 681 S.W.2d 353 (1984). A corresponding change has been made in Administrative Order No. 2.

Addition to Reporter's Notes, 1999 Amendment: The rule has been revised to incorporate some features of Rule 4 of the Federal Rules of Appellate Procedure, as

amended in 1991 and 1993. On balance, the effect of the amendment is to liberalize prior Arkansas practice.

Subdivision (a) now provides that a premature notice of appeal is to be treated as if it had been filed after entry of the judgment, decree, or order. Previously, such a notice was ineffective. *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992). Subdivision (f) of the prior version of the rule, which provided that a notice of appeal was effective if filed on the same day but earlier in time than the judgment, decree, or order, has been deleted. Also deleted are two sentences in subdivision (a) dealing with the situation in which a party has not received notice of entry of a judgment, decree, or order. This issue is now addressed in paragraph (3) of subdivision (b).

Amended subdivision (b) combines subdivisions (b), (c), and (d) of the prior version of the rule. Paragraph (b)(1) is essentially former subdivision (b), with one clarifying change. A timely motion for new trial, judgment notwithstanding the verdict, or amendment of findings extends for all parties the time for filing a notice of appeal. If there are multiple motions, the 30-day period for filing a notice of appeal begins to run from entry of the order disposing of "the last motion outstanding" or the date on which such motion is deemed denied by operation of law.

Paragraph (b)(2), based on Federal Rule 4(a)(4), is new. It provides that a notice of appeal filed before disposition of one of the specified posttrial motions becomes effective on the day after a dispositive order is entered or the motion is deemed denied by operation of law. Under prior practice, a premature notice of appeal was ineffective. *Chickasaw Chemical Co. v. Beasley*, 328 Ark. 472, 944 S.W.2d 511 (1997); *Kimble v. Gray*, 313 Ark. 373, 853 S.W.2d 890 (1993). The effect of paragraph (b)(2) is to suspend a premature notice until the motion is ruled on or deemed denied, and a new notice is not necessary to appeal the underlying case. However, a party seeking to appeal from disposition of the post-trial motion must amend the original notice to so indicate. No additional fees are required in this situation, since the notice is an amendment of the original and not a new notice of appeal.

Paragraph (b)(3) is a revised version of a provision previously found in subdivision (a), under which a party who did not receive notice of the judgment or order that he or she wished to appeal could obtain an extension from the trial court "for a period not to exceed sixty (60) days from the expiration of the time otherwise prescribed by these rules." This rule proved restrictive in operation. *See, e.g., Jones-Blair Co. v. Hammett*, 51 Ark. App. 112, 911 S.W.2d 263 (1995), *rev'd on other grounds*, 326 Ark. 74, 930 S.W.2d 335 (1997); *Chicka-*

saw Chemical Co. v. Beasley, *supra*. Accordingly, paragraph (b)(3) expands the period during which an extension may be sought. The trial court may extend the time for filing the notice of appeal "upon motion filed within 180 days of entry of the judgment, decree, or order." If such an extension is granted, the notice of appeal must be filed within fourteen days from the date on which the extension order is entered. These time frames are taken from the corresponding federal rule. *See* Rule 4(a)(6), Fed. R. App. P. Like the federal rule, paragraph (b)(3) also requires a determination by the trial court that no party would be prejudiced by the extension of time. The term "prejudice" means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Addition to Reporter's Notes, 2000

Amendment: Former subdivision (c) of the rule has been redesignated as subdivision (d) and a new subdivision (c) added. By virtue of the new provision and a cross-reference in subdivision (a), a statutory deadline for election cases is controlling as to the timeliness of an appeal, notwithstanding the 30-day period generally applicable under subdivision (a). The amendment reflects recent Supreme Court decisions to that effect. *See Citizens for a Safer Carroll County v. Epley*, 338 Ark. 61, 991 S.W.2d 562 (1999) (applying Ark. Code Ann. § 3-8-205(e)(1), which provides for a 10-day period in which to file a notice of appeal in cases involving the sufficiency of petitions in local option elections); *Weems v. Garth*, 338 Ark. 437, 993 S.W.2d 926 (1999) (applying Ark. Code Ann. § 7-5-810, which imposes a seven-day limit for an appeal from a circuit court in an election contest).

Addition to Reporter's Notes, [February] 2001 Amendment: Rule 4(b)(1) has been amended to clarify which post-trial motions extend the time for filing the notice of appeal. Confusion has arisen in the past as to the effect of a motion other than the three specified in the rule. *See, e.g., McCoy v. Moore*, 338 Ark. 740, 1 S.W. 3d 11 (1999). Under the amended rule, timely motions under Rules 50(b), 52(b), and 59(a) extend the time, as does "any other motion to vacate, alter, or amend the judgment made no later than 10 days after entry of judgment." For example, a motion to set aside the judgment pursuant to Rule 60 extends the time for filing the notice of appeal, so long as it is made no later than 10 days after the judgment is entered. The 10-day period corresponds to the time frame for motions under Rules 50(b), 52(b), and 59(a).

Addition to Reporter's Notes, [July]

2001 Amendment: The references to “trial court” in subdivisions (a), (b)(1), and (b)(3) have been replaced with “circuit court.” Constitutional Amendment 80 established the circuit courts as the “trial courts of original jurisdiction” in the state and abolished the separate chancery and probate courts. Also, the reference to the “clerk of the court” in subdivision (d) has been replaced with “clerk of the circuit court.” In most cases, the circuit clerk serves as clerk of the circuit court. However, in some counties the county clerk handles probate matters. This division of labor is discussed in the 2001 Reporter’s Note accompanying Rule 3 of the Rules of Civil Procedure.

Addition to Reporter’s Notes, 2003 Amendment: Subdivision (d) has been amended to incorporate the provisions of Administrative Order No. 2(b), which governs the entry of judgments and orders. This change ensures that the rule is consistent with the order.

Addition to Reporter’s Notes, 2004 Amendment: The first sentence of subdivision (b)(3) has been amended by replacing the

word “may” with “shall,” thereby requiring the circuit court to extend the time under the circumstances described in this provision. This change has the effect of overruling *Arnold v. Camden News Pub. Co.*, 110 S.W.3d 268 (Ark. 2003).

A new third sentence has been added to subdivision (b)(3) to make plain that although an extension of time is no longer possible because more than 180 days have passed, the circuit court retains its authority to take action under Ark. R. Civ. P. 60. This provision has the effect of overruling *Barnett v. Monumental Gen. Ins. Co.*, 97 S.W.3d 901 (Ark. App. 2003).

Addition to Reporter’s Notes, 2006 Amendment: Subdivision (b)(3) has been amended to reflect the holding in *Arkco Corp v. Ashe*, 360 Ark. 222, 200 S.W.3d 444 (2004). In addition to satisfying the Rule’s other conditions, the party seeking to reopen the time to file a notice of appeal must demonstrate diligence by the party’s counsel in attempting to find out if the circuit court had entered the judgment, decree, or order from which appeal is sought.

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CASE NOTES

ANALYSIS

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In General.

In a per curiam opinion delivered on January 21, 1994, the Supreme Court amended its rules of criminal procedure to clarify that, if a post-trial motion in the nature of a motion for a new trial or amendment of judgment is not resolved by the trial court within thirty days

from the date of its filing, it was deemed denied under former ARAP 4(c); the court subsequently readopted this rule and made it a part of RAP-Crim 2, which superseded former ARCP 36.9. *Harris v. State*, 327 Ark. 14, 935 S.W.2d 568 (1997).

The requirement of § 3-8-205 that an appeal be filed within 10 days with regard to the sufficiency of the number of signatures on a petition on a local option issue is not superseded by the 30-day period for an appeal contained in this rule. *Citizens for a Safer Carroll County v. Epley*, 338 Ark. 61, 991 S.W.2d 562 (1999).

Construction.

The term "from" in subsection (a) of this rule means "after". *Watson v. State*, 313 Ark. 409, 856 S.W.2d 1 (1993).

Defendant did not clearly violate subsection (c) of this rule by filing his notice of appeal before the order denying the motion to set aside the judgment was entered, since the "motion to set aside the judgment" is not analogous to any of the motions listed in subsection (b) of this rule. *Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993).

A motion for new trial in a criminal case, made pursuant to subsection (c) of this rule is analogous to a motion made pursuant to ARCP 59. *Banning v. State*, 43 Ark. App. 106, 861 S.W.2d 119 (1993).

"Entry" of a document is distinct from "dated" or "filed": the term "dated" refers to the date the judge signs the order; a document is "filed" on the date the clerk file-stamps it; and a document is "entered" when it is actually recorded on the docket sheet or book by the clerk. *In re Bunt*, 165 B.R. 894 (Bankr. E.D. Ark. 1994).

The 30-day deadline of subsection (a) of this rule for filing a notice of appeal is not extended under subsection (b) of this rule by the filing of a motion under ARCP 60. *Criswell v. Holliday*, 330 Ark. 762, 957 S.W.2d 181 (1997).

Although subdivision (b)(3) of this rule was amended to incorporate some features of Fed. R. Civ. P. 4, the federal rules require the clerk to send entered precedents to counsel of record while the Arkansas' rules contain no such requirement; thus, it remains the duty of the parties to make themselves aware of the status of their cases and the due diligence requirement must still be read into the rule. *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004).

The 2004 amendment to subdivision (b)(3) of this rule only changed the trial judge's burden and duty; when the trial court is faced with an attorney who acts diligently but who has nevertheless not received notice of the entry of an order, that judge shall grant an extension as it is now mandatory. *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004).

Purpose.

The purpose of the 1988 amendments to this rule was to simplify appellate practice and eliminate confusion as to the time for filing the notice of appeal. *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992).

Applicability.

This rule is not intended to govern appeals from the Workers' Compensation Commission. *Sunbelt Couriers v. McCartney*, 303 Ark. 522, 798 S.W.2d 92 (1990).

Subsection (c) of this rule requiring action on a Rule 59 motion within 30 days of filing does not apply to a Rule 60(a) request to correct an order. *Upton v. Estate of Upton*, 308 Ark. 677, 828 S.W.2d 827 (1992).

Subsection (c) of this rule applies in criminal cases. *Giacona v. State*, 311 Ark. 664, 846 S.W.2d 185 (1993); *Enos v. State*, 313 Ark. 683, 858 S.W.2d 72 (1993); *Banning v. State*, 43 Ark. App. 106, 861 S.W.2d 119 (1993).

The Supreme Court will look to see what a motion actually is in determining questions of this rule's applicability. *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994), questioned *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997).

Subsection (c) of this rule, by its terms, is applicable to specific civil motions including a motion for judgment notwithstanding the verdict under ARCP 50(b), a motion to amend findings of fact or to make additional findings of fact under ARCP 52(b), and a motion for a new trial under ARCP 59(b); however, subsection (c) of this rule has been applied to criminal matters where the motion made following the judgment of conviction was analogous to a civil motion made under ARCP 50(b), ARCP 52(b), or ARCP 59(b). *Fuller v. State*, 316 Ark. 341, 872 S.W.2d 54 (1994), questioned *Crisco v. State*, 328 Ark. 388, 943 S.W.2d 582 (1997).

A motion for remittitur is not contemplated by subsection (b) of this rule. *Pennington v. Harvest Foods, Inc.*, 322 Ark. 820, 913 S.W.2d 758 (1995).

Subsection (c) of former ARAP 4 applied to criminal matters where the motion made following the judgment of conviction was analogous to a civil motion made under ARCP 49(b), ARCP 50(b), or ARCP 52(b). *Smith v. State*, 49 Ark. App. 73, 896 S.W.2d 450 (1995), appeal denied 320 Ark. 658, 898 S.W.2d 468 (1995).

Subsection (b) of this rule did not apply where the request for attorney's fees was made at the same time as appellee's motion for a protective order; it was not a post-trial motion and the notice of appeal was timely filed for the December 30, 2002, order regarding attorney's fees. *Abramson v. Eldridge*, 353 Ark. 354, 107 S.W.3d 171 (2003).

Party's failure to file a timely notice of appeal with regard to an order granting summary judgment to her former attorney in an

action seeking recovery of attorney's fees and costs and her failure to argue the trial court's decision on the post-trial motion for fees and costs in her original brief led to dismissal of the appeal for lack of jurisdiction. *Stacks v. Marks*, 354 Ark. 594, 127 S.W.3d 483 (2003).

Subsection (c) of this rule does not apply to Ark. R. Crim. P. 37 appeals. *Morgan v. State*, 360 Ark. 264, 200 S.W.3d 890 (2005).

Where the trial court failed to rule on a bank's motion to vacate documents related to the foreclosure sale of property because of a clerical error, the Supreme Court of Arkansas lacked jurisdiction to hear the bank's appeal until there was a final, appealable order, and the bank's motion did not fall within the "deemed denied" provision of subdivision (b)(1) of this rule because the appeal was not filed within 10 days the filing of the motion. *First Nat'l Bank v. Mayberry*, 366 Ark. 39, 233 S.W.3d 152 (2006).

Prisoner's petition for writ of mandamus seeking to compel a circuit judge to issue a ruling on his motion for reconsideration of the alleged denial of his request for habeas relief was moot; assuming the prisoner's asserted date of December 19, 2007, or a later date, for the judgment on his habeas petition under subdivision (b)(1) of this rule was the applicable rule concerning the motion for reconsideration because the motion was filed within the 10-day period stated in the rule. Under the computation rules in Ark. R. Civ. P. 6(a), the 10-day period would have expired on January 7, 2008, and the prisoner's motion for reconsideration would have been deemed denied on the thirtieth day after it was filed; in that case, the prisoner received the relief he requested, i.e., a ruling on his motion for reconsideration, albeit through operation of law rather than a written order. *Henson v. Wyatt*, 373 Ark. 315, 283 S.W.3d 593 (2008).

In an action alleging that the tobacco company breached the terms of the Master Settlement Agreement, the tobacco company did not amend its notice of appeal to include an appeal from the denial of its motion to amend or alter the judgment. Thus, its motion to amend or alter the judgment, which included its request to join indispensable parties, could not be addressed on appeal under subdivision (b)(2) of this rule. *Vibo Corp. v. State ex rel. McDaniel*, 2011 Ark. 124, — S.W.3d —, 2011 Ark. LEXIS 122 (Mar. 31, 2011).

Appellant's motion to vacate was filed on July 6, 2011, which was more than 10 days after the entry of a June 14, 2011 order. Thus, appellant was precluded from relying on the deemed-denied provision of subdivision (b)(1) of this rule because his motion to vacate the order was untimely. *Jewell v. Fletcher*, 2012 Ark. 132, — S.W.3d —, 2012 Ark. LEXIS 153 (Mar. 29, 2012).

Appellant's letter to the circuit court did not

extend the time for filing a notice of appeal. To be timely, appellant was required to file his notice of appeal within 30 days of the June 14, 2011 order, but appellant did not file his notice of appeal until August 3, 2011. *Jewell v. Fletcher*, 2012 Ark. 132, — S.W.3d —, 2012 Ark. LEXIS 153 (Mar. 29, 2012).

Belated Appeal.

The failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal constitutes a denial of effective assistance of counsel and is good cause for granting a belated appeal. *Gay v. State*, 288 Ark. 589, 707 S.W.2d 320 (1986).

The defendant was denied effective assistance of counsel and was entitled to a belated appeal where his counsel failed to perfect an appeal and the defendant had showed that he desired an appeal by filing a pro se notice of appeal, even though he did not specifically notify his counsel that he had filed an appeal. *Gay v. State*, 288 Ark. 589, 707 S.W.2d 320 (1986).

Where failure to renew a timely notice of appeal within thirty days after order denying a new trial was due to attorney's neglect there was good cause for court to grant motion for belated appeal to supplement the record. *Weaver v. State*, 304 Ark. 77, 798 S.W.2d 925 (1990).

Where appellant's attorney assumed responsibility for not verifying that the judgment and commitment order had been filed prior to the untimely filing of the motion for new trial, the appellate court treated the motion for rule on the clerk as a motion for belated appeal, which it granted. *Webster v. State*, 320 Ark. 393, 896 S.W.2d 890 (1995).

There is no provision for a belated appeal on the ground that the plaintiff was unaware that an order had been entered as is permitted in certain circumstances in criminal cases under former ARCrP 36.9 (now see RAP-Crim 2). *Miller v. King*, 322 Ark. 819, 912 S.W.2d 416 (1995).

If the petitioner fails to file a timely notice of appeal, a belated appeal will not be allowed absent a showing by petitioner of good cause for failure to comply with the proper procedure; the fact that a petitioner is proceeding pro se does not in itself constitute good cause for failure to conform to the prevailing rules. *Leavy v. Norris*, 324 Ark. 346, 920 S.W.2d 842 (1996).

Father's motion to file a belated appeal of an order terminating his parental rights was granted as the failure of father's counsel to inform him that he had the right to appeal the order was a good reason to grant the motion. *Flannery v. Ark. HHS*, 368 Ark. 31, 242 S.W.3d 619 (2006).

Appeal was dismissed for lack of jurisdiction because the notice of appeal was not timely filed under this rule; the final appeal-

able order was dated November 3, when faxed according to Administrative Order of the Supreme Court No. 2, and not November 10, when hard copies were submitted. The November 10 order was clearly *nunc pro tunc* to correct an interest rate, and only that issue was appealable and not issues in the original order from which a timely appeal could have been taken. *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 265 S.W.3d 117 (2007).

Court clerk should have filed a movant's notice of appeal on the day the notice of appeal from the denial of his motion for post-conviction relief was filed, whether or not the movant was allowed to proceed in forma pauperis. The motion to file a belated appeal was granted because, but for this clerical error, the notice of appeal was timely filed. *White v. State*, 373 Ark. 415, 284 S.W.3d 64 (2008).

After the entry of a dependency-neglect order, the father filed two unsigned notices of appeal that did not meet the requirements of Ark. Sup. Ct. & Ct. App. R. 6-9(b)(1)(B); a third, signed notice of appeal was filed after the denial of his motion for new trial. The Supreme Court of Arkansas held that the appeal was untimely, because subsection (b) of this rule, which extended the time for filing a notice of appeal after the denial of a motion for new trial, did not apply in a dependency proceeding; however, as expedition of the appellate process was a goal in dependency-neglect cases, the father was permitted to file a belated appeal. *Ashcroft v. Ark. Dep't of Human Servs.*, 2009 Ark. 461, — S.W.3d —, 2009 Ark. LEXIS 617 (2009).

Court of appeals lacked jurisdiction to hear an appeal because plaintiff did not file a timely appeal from the trial court's final order under subsection (b) of this rule; the order made it clear that all of the named and served defendants were dismissed, and pursuant to Ark. R. Civ. P. 54(b)(5), the remaining defendants, who had not been served, were also dismissed. *Global Econ. Res., Inc. v. Swaminathan*, 2011 Ark. App. 349, — S.W.3d —, 2011 Ark. App. LEXIS 387 (May 11, 2011).

Briefs.

Rebriefing was needed in the event that the appeal was pursued, because several items were missing, and it appeared that the counterclaims and related orders were not in either the record or the addendum; it was strongly recommend that the parties review their arguments and addendum to determine whether the addendum should be supplemented with any other pleadings or documents to support its arguments on appeal. *Jenkins v. APS Ins., LLC*, 2012 Ark. App. 368, — S.W.3d —, 2012 Ark. App. LEXIS 486 (May 30, 2012).

Cross-Appeal.

Although notice was styled "notice of appeal," the Supreme Court has recognized that a cross-appeal is an appeal by an appellee who seeks something more than was received in the trial court. *Flemings v. Littles*, 324 Ark. 112, 918 S.W.2d 718 (1996).

Other than the mother's attorney's statement, the appellate court had no proof with which to determine whether the cross-appeal was timely, as it simply could not determine that the appellate court had jurisdiction to hear a cross-appeal based upon a bare assertion by an attorney; the appellate court had no proof before it that the notice of appeal was not received until August 17, and it dismissed the cross-appeal as untimely. *Rawe v. Rawe*, 100 Ark. App. 90, 264 S.W.3d 549 (2007).

Disposition of Motion.

Taking a new trial motion under advisement or setting a hearing date within 30 days does not satisfy the requirements of subsection (c) of this rule, since only a decision entered of record within 30 days will satisfy the requirements of subsection (c) of this rule, and an order taking a motion under advisement or setting a hearing date is not the equivalent of a decision of record. *Arkansas State Hwy. Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992).

Order which did not arise out of a motion for judgment notwithstanding the verdict under ARCP 50(b), out of a motion to amend the court's findings of fact or to make additional findings under ARCP 52(b), or out of a motion for a new trial under ARCP 59(b), was not an order disposing of a postjudgment motion under this rule and did not bring up for review an earlier order; therefore, the filing of the record on appeal was outside the seven-month maximum period allowed for that purpose by ARAP 5(b) with respect to the earlier order. *Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755 (1995).

Where a motion to set aside a foreclosure sale was filed by mortgagors on November 20, 2003, it was deemed denied on December 20, 2003, where the trial court did not rule on the motion until March 23, 2004. *Seay v. C.A.R. Transp. Brokerage Co.*, 366 Ark. 527, 237 S.W.3d 48 (2006).

Although a decedent's heirs filed a timely motion for reconsideration of their argument bases on an alleged constructive trust, their argument was not preserved for appeal because the heirs failed to obtain a ruling on the issue. *Long v. Simpson*, 2009 Ark. App. 488, — S.W.3d —, 2009 Ark. App. LEXIS 510 (2009).

Entry of Judgment.

The time for filing the notice of appeal runs from the date the judgment or decree is filed in the circuit or chancery clerk's office, not from its recordation; hence, the filing date

should be clearly stamped on the document. If the date of recording is also to be stamped, the stamp should not include the word "filed." *Schaefer v. McGhee*, 284 Ark. 370, 681 S.W.2d 353 (1984).

The language of AICR 9(a) [now ADCR 9(a)], providing for appeal to circuit court, is similar to subsection (e) of this rule, which provides that time for appeal runs from the date of filing. *West Apts., Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988).

While subsection (e) of this rule establishes that a judgment is entered when it is filed with the clerk of a circuit, chancery, or probate court, the procedure is decidedly different from the manner in which a judgment is entered in inferior court [now district court] proceedings; that difference becomes quickly apparent by a review of AICR 8 and AICR 9 [now ADCR 8 and ADCR 9]. These rules, particularly AICR 8(c) [now ADCR 8(c)], reflect that an inferior court [now district court], such as the municipal court, enters any judgment it renders by entering, in a timely manner, the date and amount of the judgment in the court's docket; this specific procedure for entering judgments in an inferior court [now district court] is in marked contrast to that applicable to courts of general jurisdiction under subsection (e) of this rule, where judgments are entered only when they are filed with the clerk of those courts. *West Apts., Inc. v. Booth*, 297 Ark. 247, 760 S.W.2d 861 (1988).

The date a judgment is filed with a court clerk is denoted by the clerk marking or stamping the date and the word "filed" on the document. *Arkansas Dep't of Human Servs. v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994).

Where the clerk placed her filemark on the second, sealing, order and then securely taped a copy of that second order onto the face of the envelope containing the final, sealed, order so that there could be no doubt to the clerk for placement in the folio, there was a sufficient marking of the final order to constitute an entry for purposes of appeal; this holding is limited to the facts of this case, since the trial court had no authority to seal the final order. *Arkansas Dep't of Human Servs. v. Hardy*, 316 Ark. 119, 871 S.W.2d 352 (1994).

Although the order denying the appellant's motion for a new trial was entered on April 13, 1994, nunc pro tunc February 21, 1994, a judgment or order is entered within the meaning of this rule when it is filed with the clerk of the court in which the claim was tried. *Smith v. State*, 49 Ark. App. 73, 896 S.W.2d 450 (1995), appeal denied 320 Ark. 658, 898 S.W.2d 468 (1995).

Although the trial judge orally advised appellant that he had denied, and hence "disposed of," the motion for new trial, under subsection (e) of this rule, an order is entered when it is filed with the clerk of the court, and

the trial court's decision from the bench was ineffective in this context. *Schaeffer v. City of Russellville*, 52 Ark. App. 184, 916 S.W.2d 134 (1996).

Where occupiers' appeal on the denial of a default judgment on their counterclaim was antecedent to the trial court's pronouncement of judgment on the counterclaim, the notice of appeal was premature and the appeal had to be dismissed. *Ross v. Jones*, 80 Ark. App. 382, 96 S.W.3d 738 (2003).

Extension of Time.

A showing of failure to receive notice of entry of the judgment, which is adequately supported by the record is a prerequisite to trial court's exercise of discretion to extend the time for appeal, and absent such a showing, the trial court does not have discretionary authority to extend the appeal time. *Arkansas State Hwy. Comm'n v. Philrite Dev., Inc.*, 30 Ark. App. 88, 782 S.W.2d 595 (1990).

Although subsection (b) of this rule and RAP-Civ 5(b) provide for extensions in both filing the notice of appeal and filing the record that is designated therein, their applicability is limited by the type of post-judgment motions that are filed. *Pennington v. Harvest Foods, Inc.*, 322 Ark. 820, 913 S.W.2d 758 (1995).

Where neither a notice of appeal nor a motion for extension was filed within 30 days from the deemed-denied date for post-trial motions, the narrow exception in subsection (a) of this rule, allowing for an extension of time, did not apply. *Chickasaw Chem. Co. v. Beasley*, 328 Ark. 472, 944 S.W.2d 511 (1997).

A notice of appeal was timely filed where (1) a motion for amended judgment was filed within 10 days after judgment, and (2) the notice of appeal was filed within 30 days after the filing of the motion. *Newcourt Fin., Inc. v. Canal Ins. Co.*, 67 Ark. App. 347, 1 S.W.3d 452 (1999).

In an action arising from a fatal automobile accident, the decedent's employer's workers' compensation carrier was entitled to an extension of time to file a notice of appeal under subdivision (b)(3) of this rule, notwithstanding that it was not a party to the proceeding when the order appealed from was entered, as the carrier should have been a party since it had a pecuniary interest at stake in the wrongful death action. *General Accident Ins. Co. v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000).

It is the motion for an extension that must be filed within 180 days from the order appealed, not the trial court's order granting the motion. *General Accident Ins. Co. v. Jaynes*, 343 Ark. 143, 33 S.W.3d 161 (2000).

The trial court did not have jurisdiction to vacate that order and issue a new identical order in order to give the appellant a chance to file a timely appeal; instead, the court

should have extended the time to file an appeal pursuant to subdivision (b)(3) of this rule. *Oak Hill Manor v. Arkansas Health Servs. Agency*, 72 Ark. App. 458, 37 S.W.3d 681 (2001).

Fed. R. App. P. 4(a)(6) required the clerk to send entered precedents to counsel of record, however, this rule contained no such requirement; it remained the duty of the parties to make themselves aware of the status of their cases, particularly when counsel for appellant was aware that the order could be entered by the court at any time. *Arnold v. Camden News Publ. Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003).

The 180-day deadline in subdivision (b)(3) of this rule for requesting an extension in which to file a notice of appeal cannot be extended by use of ARCP 60 to cure problems of lack of notice. *Barnett v. Monumental Gen. Ins. Co.*, 81 Ark. App. 23, 97 S.W.3d 901 (2003), appeal dismissed 354 Ark. 692, 128 S.W.3d 803 (2003).

In client's attorney malpractice action against its lawyer for failing to perfect the client's appeal in a civil case, the appeal from the summary judgment rendered in the attorney's favor was dismissed as the client made no showing of reasonable diligence in seeking to become informed about the entry of the trial court's order; had the client's current attorney followed up on the entry of the order and shown that he otherwise met the requirements of this rule, the trial court would have been under an absolute obligation to grant his motion for extension of time, however, because the client's current attorney offered no proof that he acted diligently, the trial court erred in granting his motion to extend time. *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004).

Company's attorney failed to exercise due diligence in keeping up with the court's docket to determine whether the December 19, 2003, order had been entered; had the attorney followed up on the entry of the order and shown that he otherwise met the requirements of subdivision (b)(3) of this rule, the trial court would have been under an absolute obligation to grant his motion for extension of time. *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004).

Appeals from a circuit court's order construing a decedent's will in the widow's favor were timely, under § 28-1-116(a) and (g), because (1) any attempt to appeal from the partial summary judgment would have been a nullity because the partial summary judgment lacked finality because it was obviously partial and other issues remained, and the partial summary judgment did not contain an Ark. R. Civ. P. 54(b) certification allowing for an immediate appeal; (2) the partial summary judgment became final on July 31, 2006,

when judgment was entered disposing of the remaining claims; (3) motions for new trial were filed and, under subsection (b) of this rule, such motions extended the time for all parties to file their notice of appeal; and (4) the older children filed their notice of appeal on September 18, 2006. *Taylor v. Woods*, 102 Ark. App. 92, 282 S.W.3d 285 (2008).

In an action challenging the denial of an administratrix's request for a hardship waiver to prevent the recovery of estate assets for Medicaid reimbursement, the trial court abused its discretion in granting the administratrix's motion under subdivision (b)(3) of this rule for an extension of time to file a notice of appeal because the trial court did not hold a hearing or recover any evidence that she had acted diligently. *Tissing v. Ark. Dep't of Human Servs.*, 2009 Ark. 166, 303 S.W.3d 446 (2009).

In a condemnation action, lessees' appeal was untimely under this rule, as their motion for attorney's fees was a collateral matter that did not extend the filing deadline. *Ellis v. Ark. State Highway Comm'n*, 2010 Ark. 196, 363 S.W.3d 321 (2010).

Plaintiff did file a postjudgment motion to amend, but plaintiff could not extend the time for filing the notice of appeal under subsection (b) of this rule because it was filed well after the ten-day period expired for filing such a motion under the rule; even had the post-trial motion been filed timely under subsection (b), it would have been deemed denied. *Global Econ. Res., Inc. v. Swaminathan*, 2011 Ark. App. 349, — S.W.3d —, 2011 Ark. App. LEXIS 387 (May 11, 2011).

Failure to Give Notice.

Where there was no notice of a cross appeal by the appellee, the Supreme Court would not consider the issues raised in the cross appeal. *Elcare, Inc. v. Gocio*, 267 Ark. 605, 593 S.W.2d 159 (1980).

Where motion to vacate judgment was not presented to the court, nor did the appellant ask the court to set the matter for a hearing, nor was the motion taken under advisement by the court, the motion was deemed to be disposed of at the expiration of 30 days just as if the court had actually denied it upon its merits; since the appellant did not give notice of appeal within prescribed period thereafter, the Court of Appeals did not have jurisdiction to hear the case on its merits. *Jacobs v. Leilabadi*, 267 Ark. 1020, 593 S.W.2d 479 (1980).

Where the clerk of the Supreme Court refused to accept a transcript of the record because the notice of appeal was untimely, a motion for rule on the clerk was properly denied even though the motion was accompanied by a certificate of the attorney for the appellee stating that he had no objection to the granting of the motion because although a

party may consent to jurisdiction over his person, jurisdiction cannot otherwise be conferred on the court by consent. *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980).

Although the criminal case coordinator received a letter from petitioner in which he indicated that he had filed a notice of appeal in circuit court, the letter could not be considered proof of what petitioner actually mailed to the circuit clerk because there was no means of verifying its contents or otherwise determining what may have been mailed to the clerk. It must be assumed that if petitioner had mailed the notice of appeal to the clerk, it would have been delivered by the post office. *Skaggs v. State*, 287 Ark. 259, 697 S.W.2d 913 (1985).

The failure to file a timely notice of appeal deprives the Supreme Court of jurisdiction. *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986).

Filing of Decree.

Revocation of a holographic will that provided that the decedent's estate would pass to his former wife was appropriate because the parties' divorce occurred after the execution of the decedent's holographic will and his bequest was revoked by operation of law. The wife's argument that the divorce occurred on the day of the hearing when the settlement agreement was announced from the bench was improper pursuant to subsection (d) of this rule and Ark. R. Civ. P. 58 because, notwithstanding that there was a lack of evidence of the settlement agreement on March 20, 2000, the divorce decree was not entered until May 23, 2000, after the decedent executed his holographic will; the March 20, 2000, date was of no consequence and the divorce was finalized on May 23, 2000, when the divorce decree was filed with the circuit court. *Langston v. Langston*, 371 Ark. 404, 266 S.W.3d 716 (2007).

Filing of Record.

The limitation in ARAP 5(b), that the trial court cannot extend the time for filing the record to a date more than seven months after the entry of the judgment, was not superseded or extended by subsection (b) of this rule which provides for extension of time in connection with post judgment motions, such as a motion for a new trial. The extension in subsection (b) of this rule is only for the filing of the notice of appeal, not for lodging the record in the appellate court. *Yent v. State*, 279 Ark. 268, 650 S.W.2d 577 (1983), criticized *Pentron Corp. v. Delta Steel & Constr. Co.*, 689 S.W.2d 539 (1985). But see *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985).

If parties plan to base their arguments on the timeliness of the notice of appeal from the denial of a motion for a judgment n.o.v. or a

new trial motion upon a written record that a hearing has been set or held, a transcript of the hearing or other record of its having been held must be filed and made an official record of the court within 30 days from the making of the motion for a judgment n.o.v. or for a new trial. *Brittenum & Assocs. v. Mayall*, 286 Ark. 427, 692 S.W.2d 248 (1985).

Untimely record will not be permitted to be filed unless attorney assumes full responsibility for presenting it late; statement that it was someone else's fault or no one's fault will not suffice. *Terrell v. State*, 294 Ark. 461, 744 S.W.2d 734 (1988).

Where no findings or orders were filed with clerk of the court within 30 days after motion for new trial had been filed, it was deemed that motion was finally disposed of at expiration of the 30 days from its filing and that record was tendered late. *Terrell v. State*, 294 Ark. 461, 744 S.W.2d 734 (1988).

Where the trial court signed an order extending the time to file a transcript within the 90-day period, but it was not entered within that period by filing the order with the clerk of court in which the case was tried, the appellant's tender of the transcript was properly denied by the clerk. *Voyles v. Voyles*, 311 Ark. 186, 842 S.W.2d 21 (1992).

Jurisdiction.

The trial court, by operation of law, loses jurisdiction to rule on a motion for a new trial after the expiration of the 30 days if no written notation is entered either taking the motion under advisement or setting a hearing date. *Deason v. F & M Bank*, 299 Ark. 167, 771 S.W.2d 749 (1989), criticized *Arkansas State Highway Com. v. Ayres*, 842 S.W.2d 853 (1992), questioned *Wal-Mart Stores, Inc. v. Isely*, 823 S.W.2d 902 (1992); *Wal-Mart Stores, Inc. v. Isely*, 308 Ark. 342, 823 S.W.2d 902 (1992).

Under subsection (c) of this rule, a trial court loses jurisdiction if a motion for new trial is not decided within 30 days from its filing. *Arkansas State Hwy. Comm'n v. Ayres*, 311 Ark. 212, 842 S.W.2d 853 (1992).

Where the notice of appeal was filed before the disposition of appellant's posttrial motion, under the express language of subsection (c) of this rule it had no effect; it follows that the appellate court lacked jurisdiction to hear the appeal. *Banning v. State*, 43 Ark. App. 106, 861 S.W.2d 119 (1993).

Substantial compliance with this rule is not sufficient; the failure to file a timely notice of appeal deprives the appellate court of jurisdiction. *Rossi v. Rossi*, 319 Ark. 373, 892 S.W.2d 246 (1995).

Court of appeals lacked jurisdiction to hear an appeal because plaintiff did not file a timely appeal from the trial court's final order under subsection (b) of this rule, and the order from which plaintiff attempted to ap-

peal, which was entered after the trial court lost jurisdiction, did not change any of the trial court's previous rulings from the final order; the trial court had lost jurisdiction under Ark. R. Civ. P. 60(a) long before either of the subsequent orders was entered, and plaintiff never alleged, and the trial court never found, that any of the Rule 60(c) exceptions applied. *Global Econ. Res., Inc. v. Swaminathan*, 2011 Ark. App. 349, — S.W.3d —, 2011 Ark. App. LEXIS 387 (May 11, 2011).

As a motion to compel arbitration, which was an amendment of an earlier motion seeking the same relief but was treated as a motion for reconsideration because the prior motion was already decided, did not extend the time for filing a notice of appeal under subsection (b) of this rule, an untimely notice of appeal required dismissal. *Centennial Bank v. Tribuilt Constr. Group, LLC*, 2011 Ark. 245, — S.W.3d —, 2011 Ark. LEXIS 226 (June 2, 2011).

Motion for New Trial.

In the absence of a written record, the time for filing a notice of appeal expires ten (now 30) days after the deemed disposition of the motion for new trial. *Smith v. Boone*, 284 Ark. 183, 680 S.W.2d 709 (1984) (decision prior to 1987 amendment).

Subsection (c) of this rule permits the time for filing a notice of appeal to be extended by filing a new trial motion; the 30-day period for filing a notice of appeal runs from the expiration of 30 days after the motion is filed unless the motion is set for hearing or taken under advisement within 30 days after it is filed. To comply with the requirement of subsection (c) of this rule, a written record of setting a hearing or taking the motion under advisement must have been made within 30 days of the filing of the new trial motion. *Watts v. Reynolds*, 286 Ark. 425, 692 S.W.2d 247 (1985), questioned *Bush v. Bush*, 816 S.W.2d 590 (1991).

When no order was entered taking the motion for a new trial under advisement and no notice of appeal was filed within the time allowed, the order dismissing the complaint became final. *Majors v. Pulaski County Election Comm'n*, 287 Ark. 208, 697 S.W.2d 535 (1985).

Where the appellant's motion for new trial was not denied, but rather was "deemed disposed of" in accordance with subsection (c) of this rule, the only appealable matter was the original judgment or order, and the appeal had to be within time provided in subsection (d) of this rule. *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986).

Where a motion for judgment n.o.v. or alternatively for a new trial was filed before the entry of judgment, but the record disclosed no action of any kind on that motion during the 30 days allowed by subsection (c) of this rule,

the motion was deemed to have been denied at the expiration of 30 days after its filing, and the court lost jurisdiction to act upon it. *Street v. Kurzinski*, 290 Ark. 155, 717 S.W.2d 798 (1986).

Attorney's admission that the record was tendered late in that it contained no written indication that, within 30 days from the filing of a motion for new trial, a ruling was obtained from the trial court either that the motion was being taken under advisement or that the matter was set for hearing on a definite date was good cause to grant the motion for rule on the clerk. *Terrell v. State*, 294 Ark. 583, 745 S.W.2d 135 (1988).

Where notice of appeal is filed before the disposition of a motion for new trial, the notice of appeal has no effect, and if a new notice of appeal is not filed within the prescribed period, as measured from the expiration of the 30 day period, a motion to dismiss will be granted. *Ferguson v. Sunbay Lodge, Ltd.*, 301 Ark. 87, 781 S.W.2d 491 (1989).

Where motion to vacate was in the nature of a motion for a new trial under ARCP 59, it was required to be filed within ten days of judgment; since this was not done and motion to vacate did not extend the time for filing a notice of appeal under subsection (b) of this rule, appeal was dismissed as untimely. *Jackson v. Arkansas Power & Light Co.*, 309 Ark. 572, 832 S.W.2d 224 (1992).

Because the trial court neither denied nor granted appellants' new trial motion, the motion was deemed denied on July 19, 1991, or thirty days after appellants' June 19th motion was filed. Appellants then had thirty additional days within which to file their notice of appeal. *Spire v. Compton*, 310 Ark. 431, 837 S.W.2d 459 (1992).

Because subsection (a) of this rule states that a notice of appeal shall be filed within 30 days from the entry of the judgment, decree, or order, where the appellant chose not to appeal the order which granted a new trial, but instead submitted his case again to the jurisdiction of the circuit judge after the 30 days had expired for another trial on the issues, appellant was bound by that election, and limited on appeal to a consideration of the issues decided at the subsequent trial. *Mikkelsen v. Willis*, 38 Ark. App. 33, 826 S.W.2d 830 (1992).

Subsection (c) of this rule is clear that the failure to act within the 30-day period results in loss of jurisdiction in the circuit court to consider a post-trial motion; nor does the reference to certain miscarriages of justice in ARCP 60(b) invest the trial court with jurisdiction to act on an ARCP 59 motion beyond the 30-day period. *Reis v. Yates*, 313 Ark. 300, 854 S.W.2d 335 (1993).

Where the contempt order of March 11, 2005, made no mention of constitutional is-

sues, nor were any constitutional arguments raised to the trial court, and it was only in the motion for a new trial filed on March 15, 2005, that defendant claimed that she had been denied her constitutional rights with regard to the contempt proceeding, her claims were not preserved for appellate review. *Donovan v. State*, 95 Ark. App. 378, 237 S.W.3d 484 (2006).

Notice.

Where the trial court's judgment against the sellers was issued on December 21, 2001, the sellers filed a motion to vacate and for a new trial on November 15, 2002, and the sellers filed a notice of appeal from the July 3, 2003, denial of the motion to vacate on July 31, 2003, the appeal from the July 3 order was timely; the motion to vacate was timely filed within one year of the judgment in accordance with ARCP 60(c)(1), and notice of appeal from the order denying the motion was properly filed within 30 days of the order as required under subsection (a) of this rule. *Hunter v. Video Real Estate Agency, Inc.*, 355 Ark. 387, 137 S.W.3d 389 (2003).

Where the trial court's judgment against the sellers was issued on December 21, 2001, the sellers filed a motion to vacate and for a new trial on November 15, 2002, and the sellers filed a notice of appeal from the July 3, 2003, denial of the motion to vacate on July 31, 2003, the notice of appeal was not timely with regard to the December 21 judgment; pursuant to subsection (a) of this rule, notice of appeal had to be filed within 30 days of the December 21 judgment because the motion to vacate was not filed within 10 days after entry of the December 21 judgment. *Hunter v. Video Real Estate Agency, Inc.*, 355 Ark. 387, 137 S.W.3d 389 (2003).

Circuit court lacked jurisdiction to enter an order on April 8, 2005 setting aside a summary judgment because the insured's motion to set aside the summary judgment was deemed denied on January 19, 2005, and the insured's notice of appeal should have been filed 30 days from that date but because it was not filed until May 5, 2005, the notice of appeal was untimely. *Murchison v. Safeco Ins. Co.*, 367 Ark. 166, 238 S.W.3d 11 (2006).

Mother's appeal from a ruling that, in part, awarded custody of the children to the father was improper as the mother failed to properly invoke the court's jurisdiction by filing a timely notice of appeal; the mother could have appealed directly from the July 7 order under Ark. R. App. P. Civ. 2(d) since it was final as to the award of custody, but her notice of appeal, filed more than 30 days after the order changing custody, was untimely as to that order. *Perez v. Furrow*, 95 Ark. App. 333, 237 S.W.3d 109 (2006).

Reviewing court was without jurisdiction to review the appeal because the notice of appeal

was not properly and timely filed within thirty (30) days of the "order appealed from," and the conclusion and self-serving allegation that the clerk office's failed to disseminate the order fell far short of establishing the diligence required of the doctors and their attorneys so they could acquire any help or benefit from subdivision (b)(3) of this rule. *Sloan v. Ark. Rural Med. Prac. Loan & Scholarship Bd.*, 369 Ark. 442, 255 S.W.3d 834 (2007).

Subdivision (b)(1) of this rule allows the deadline for a notice of appeal to be extended to the deemed-denied date. In a termination of parental rights case, the mother asked that the appellate rule be extended to dependency-neglect cases; however, the supreme court would not extend that rule to those cases because it would vitiate the purpose of Ark. Sup. Ct. & Ct. App. R. 6-9(b)(2), which required that the notice of appeal in a termination of parental rights case be filed within 14 days. *Ratliff v. Ark. HHS*, 371 Ark. 534, 268 S.W.3d 322 (2007).

In a case involving a dispute over credit life insurance, an appeal was timely filed under subsection (a) of this rule because the first judgment in the case did not comply with Ark. Sup. Ct. Admin. Order No. 2 where the original of the facsimile-filed judgment was never filed with the trial court. The appeal was timely filed from a second judgment. *Francis v. Protective Life Ins. Co.*, 98 Ark. App. 1, 249 S.W.3d 828 (2007).

Court of appeals was without jurisdiction to consider a father's argument that the circuit court erred in denying his motion for contempt because the contempt finding was contained in an order that was not appealed from within the applicable thirty-day period under subsection (a) of this rule. *Stickels v. Heckel*, 2009 Ark. App. 829, — S.W.3d —, 2009 Ark. App. LEXIS 1038 (2009).

—In General.

Section 16-67-311 has been superseded by subsection (c) of this rule and its very similar provisions on when time begins to run on filing a notice of appeal after a motion for a new trial has been made or ruled on. *Mullen v. Couch*, 288 Ark. 231, 703 S.W.2d 866 (1986).

If the matter sought to be appealed is separate from that which has been appealed in a timely manner, it should be the subject of an original appeal, and it may not be made timely by its denomination as a cross appeal. *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986).

A lack of knowledge of the rules in itself does not constitute good cause for failure to file a timely notice of appeal. *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987).

Where the notice of appeal failed to designate the judgment or order appealed from, the notice was deficient, but not fatal; it was the fact the notice was filed prematurely which

rendered it a nullity. *Jasper v. Johnny's Pizza*, 305 Ark. 318, 807 S.W.2d 664 (1991).

Where a motion for a new trial was filed asserting facts sufficient to raise an issue whether defendant's counsel was ineffective, the time for filing a notice of appeal would not expire until 30 days after the disposition of the motion. *Gidron v. State*, 316 Ark. 352, 872 S.W.2d 64 (1994).

Appellant argued unsuccessfully that her notice of appeal was filed late through no fault of her own because her counsel had no way of knowing that an order and judgment were entered on November 3 because he did not receive copies of the November 3 filings and because his copies of the November 10 order and judgment (a nunc pro tunc order of which notice had not been given), did not contain the notation "Replaces fax filed 11-3-05." The argument was rejected because by the exercise of reasonable diligence so as to keep up with the filings in the case, appellant and her counsel would have known about the order and judgment entered on November 3 and the notation on the November 10 order and judgment. *Francis v. Protective Life Ins. Co.*, 371 Ark. 285, 265 S.W.3d 117 (2007).

If an order was appealable under Ark. R. App. P. Civ. 2(a), it had to be appealed within the thirty days after entry of the order as prescribed by subsection (a) of this rule, and the determination of whether an order was appealable under Ark. R. App. P. Civ. 2 was always secondary to the determination of whether the appeal was timely under this rule, so a reviewing court would first look to this rule to determine timeliness of a notice of appeal and then to Ark. R. App. P. Civ. 2 to determine if the order appealed from was an appealable order because (1) Ark. R. App. P. Civ. 2 governed which orders were appealable, while this rule governed when those orders had to be appealed, and (2) this rule used the word "shall," which was usually interpreted as mandatory, while Ark. R. App. P. Civ. 2 used the word "may," which was usually interpreted as discretionary, so, if an appeal "may" be taken under Ark. R. App. P. Civ. 2(a), it "shall" still be taken within thirty days from entry of that order under subsection (a) of this rule. *Brown v. Wilson* (In re Estate of Stinnett), 2011 Ark. 278, — S.W.3d —, 2011 Ark. LEXIS 251 (June 23, 2011).

—Burden of Proof.

A litigant who claims to have mailed an item has the burden of proving that he mailed it, and the bare allegation that a notice of appeal was mailed is not good cause to grant a belated appeal. *Leavy v. Norris*, 324 Ark. 346, 920 S.W.2d 842 (1996).

—Second Notice.

A first notice of appeal and first amended notice of appeal, filed by appellant on August

6 and August 7, 1997, were not timely with regard to an appeal from a July 3, 1997, order; however, a second notice of appeal filed by appellant on August 29, 1997, was timely with regard to an appeal from an August 26, 1997 order. Notwithstanding the fact that appellant had not filed a timely appeal from the July 3, 1997 order, and the July 3, 1997 order was not an "intermediate order" under RAP-Civ 2(b), appellant's timely appeal from the August 26, 1997 order would necessarily involve a review of the trial court's references to the July 3, 1997 order in the August 26, 1997 order. *Criswell v. Holliday*, 330 Ark. 762, 957 S.W.2d 181 (1997).

—Sufficient.

Although defendant did not file a second notice of appeal when his new-trial motion was deemed denied or obtain a hearing on that motion, his notice of appeal filed before his new-trial motion was effective to appeal the judgment. *Smith v. State*, 329 Ark. 238, 947 S.W.2d 373 (1997).

—Timely.

The timely filing of a notice of appeal is essential to the Supreme Court's jurisdiction. *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980).

Notice of appeal was timely and would not be dismissed. *First State Bank v. Shaver*, 279 Ark. 30, 648 S.W.2d 453 (1983).

There is no grace period for filing an appeal which grants an allowance of time for items to be transported in the mail. *Walker v. State*, 283 Ark. 339, 676 S.W.2d 460 (1984).

Notice of appeal from order denying motion to set aside a previous order was timely filed where it was filed within 30 days of entry of the late order. *Smart v. Biggs*, 26 Ark. App. 141, 760 S.W.2d 882 (1988).

A notice of appeal from the denial of a pro se motion for a new trial, which was in fact a motion for ARCrP 37.1 relief, was timely. *Haynes v. State*, 311 Ark. 651, 846 S.W.2d 179 (1993).

Where the filing deadline fell on Saturday, July 2, 1994, and was also followed by a legal holiday, Monday, July 4, 1994, the notice of appeal was timely filed on the following business day, Tuesday, July 5, 1994. *Watanabe v. Webb*, 320 Ark. 375, 896 S.W.2d 597 (1995), appeal dismissed 321 Ark. 569, 905 S.W.2d 70 (1995).

Cross-appeal which was filed December 27, 1995, was timely filed with the clerk of the court that entered the judgment, even though December 23, 1995, was the tenth day after receipt of notice of appeal; under ARAP 9 (now see RAP-Civ 9), whenever the last day for taking action falls on a Saturday, Sunday, or legal holiday, the time for such action shall be extended to the next business day, and in the case at bar December 23 was a Saturday,

December 24 was a Sunday, and December 25 and 26 were legal holidays; therefore, December 27 was the next business day. *Flemings v. Littles*, 324 Ark. 112, 918 S.W.2d 718 (1996).

Document with date and time affixed by the Court Clerk's facsimile machine, but not separately file-stamped by the Clerk, held timely, despite the literal interpretation of this rule and RAP-Civ 5 requiring otherwise. *Bhatti v. McCabe*, 326 Ark. 176, 928 S.W.2d 340 (1996).

Appellant's entry of notice of appeal from the denial of her motion to set aside a default judgment was tendered within the 30-day time constraint of subsection (a) of this rule and the tender of the record was also timely, and, therefore, her motion for rule on the clerk would be granted. *DePriest v. Carruth*, 334 Ark. 378, 974 S.W.2d 471 (1998).

Where the appellee timely filed his motion for relief from a paternity judgment on December 8, 1995, and the court took no action on the motion until January 30, 1996, when it set the motion for hearing on February 5, 1996, the hearing was too late because the motion was already deemed denied by virtue of the court's failure to act on it within 30 days. *State Office of Child Support Enforcement v. Offutt*, 61 Ark. App. 207, 966 S.W.2d 275 (1998).

Because a holiday and 2 weekend days were excluded from computation under Ark. R. Civ. P. 6(a), a mother's postjudgment motion was timely; because a circuit court did not rule on the motion within 30 days, it was deemed denied under subdivision (b)(1) of this rule; and because the mother's notice of appeal was filed 30 days from the deemed-denied date, her appeal was timely under subsection (a) of this rule and properly before the court. *Whitmer v. Sullivent*, 373 Ark. 327, 284 S.W.3d 6 (2008).

Contractor timely filed his notice of appeal within thirty days of the entry of the trial court's final order in the case on September 6, 2011, because a notice of appeal should be filed within thirty (30) days from the entry of the judgment, decree, or order appealed from, and not from the date when the property owner lost his right to refile his nonsuited counterclaims. *Killian v. Gibson*, 2012 Ark. App. 299, — S.W.3d —, 2012 Ark. App. LEXIS 397 (Apr. 25, 2012).

—Untimely.

Where appellant made motion for new trial and, just before the 30-day period expired, the court orally denied it and the appellant neither obtained a written order and filed notice of appeal nor filed notice of appeal at once without waiting for entry of order, notice of appeal filed after the prescribed time period must be dismissed. *Coking Coal, Inc. v. Arkoma Coal Corp.*, 278 Ark. 446, 646 S.W.2d 12 (1983).

Motion for new trial deemed denied at ex-

piration of 30 day period and subsequent notice of appeal held untimely. *Reynolds v. Spotts*, 286 Ark. 335, 692 S.W.2d 748 (1985), criticized *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986). But see *Monk v. Farmers Ins. Co.*, 290 Ark. 38, 716 S.W.2d 201 (1986); *Gibson v. Crain*, 19 Ark. App. 57, 716 S.W.2d 782 (1986).

Attempted appeal was not a cross appeal where it raised issues entirely separate from those raised in the original controversy; therefore, it was an original appeal that was untimely. *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986).

Court had no jurisdiction to hear appeal filed before judge disposed of motion for new trial and before expiration of thirty-day period. *Eddings v. Lippe*, 304 Ark. 309, 802 S.W.2d 139 (1991).

Where appellant filed his notice of appeal prior to the entry of final judgment, his appeal must be dismissed; this overrules those cases in which held premature appeals to be filed on the date judgment was entered and overrules *State v. Joshua*, 307 Ark. 79, 818 S.W.2d 249 (1991).

Notice of appeal for denial of new trial, filed some 18 months after the order denying the motion was untimely. *Giacona v. State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992).

The filing of an appeal on the thirtieth day after the filing of a post-trial motion which was neither granted nor denied is untimely and ineffective. *Kimble v. Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992), *aff'd* 313 Ark. 373, 853 S.W.2d 890 (1993).

Petitioner who filed her notice of appeal one day too early failed to file a timely appeal. *Kimble v. Gray*, 313 Ark. 373, 853 S.W.2d 890 (1993).

Where appellant failed to appeal from the original order of summary judgment within 30 days as required by subsection (a) of this rule, her motion to modify the original order pursuant to ARCP 60(b), with the resulting amended order, did not salvage the appeal, since the modification was not entered within 90 days from the time that the original order was filed with the clerk. *Griggs v. Cook*, 315 Ark. 74, 864 S.W.2d 832 (1993).

Where notice of appeal was filed before judgment was entered, the notice of appeal was of no effect. *Campbell v. State*, 317 Ark. 285, 877 S.W.2d 912 (1994).

Where judgment was entered on January 4, 1994, the appellant filed a motion for a new trial on January 24, 1994, the notice of appeal was filed on February 22, 1994, and the order denying the appellant's motion for a new trial was entered on April 13, 1994, the appellant failed to file a timely notice of appeal. *Smith v. State*, 49 Ark. App. 73, 896 S.W.2d 450 (1995), appeal denied 320 Ark. 658, 898 S.W.2d 468 (1995).

Where the circuit court entered a judgment on December 20, 1993, the appellant filed a motion for a new trial on December 22, 1993, no ruling was ever made on the new trial motion, and the appellant filed a notice of appeal on January 20, 1994, from the circuit court's order of December 20, 1993, the notice of appeal was untimely. *Snowden v. Benton*, 49 Ark. App. 75, 896 S.W.2d 451 (1995).

Where trial was held on October 3, 1995, and the appellant filed a motion for a new trial on October 12, 1995, but the decree was filed on November 2, 1995, the notice of appeal was due on December 4; although the chancellor denied the motion for new trial on November 14, 1995, the motion filed before the decree was untimely and ineffective, and thus the notice of appeal from the November 2 decree and the November 14 denial, filed on December 11, was untimely. *Breckenridge v. Ashley*, 55 Ark. App. 242, 934 S.W.2d 536 (1996).

Where appellant failed to file her motion for rehearing within the ten-day period provided in ARCP 59(b), the motion failed to extend her time to file a notice of appeal under this rule. *Benedict v. National Bank of Commerce*, 329 Ark. 590, 951 S.W.2d 562 (1997).

The timeliness provisions of the rule did not apply to an appeal by the Department of Human Services from an order in an action in which it was not a party. *Arkansas Dep't of Human Servs. v. R.P.*, 333 Ark. 516, 970 S.W.2d 225 (1998).

The appellant's notice of appeal was untimely where it was filed prior to the day on which her motion for new trial was deemed denied. *Bewley v. Pyramid Leasing Co.*, 335 Ark. 373, 980 S.W.2d 556 (1998).

The filing of a motion under Rule 60 does not extend the time for filing a notice of appeal. *Shivey v. Shivey*, 337 Ark. 262, 987 S.W.2d 719 (1999).

Subsection (c) of this rule required a party to file a notice of appeal within 30 days after her motion to vacate was deemed denied, rather than 30 days after the later date that the trial court actually denied her motion to vacate. *McCoy v. Moore*, 338 Ark. 740, 1 S.W.3d 11 (1999).

Defendant's appeal of the trial court's orders certifying the class, approving the class action notice, and granting partial summary judgment in favor of plaintiff was dismissed where defendant's notice of appeal was outside the prescribed 30-day period. *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003).

Trial court did not abuse its discretion in denying appellant's motion to extend the time to file notice of appeal where appellant should have been aware that the order could be entered at any time after her own counsel informed the court that counsel had no com-

ments on the precedent submitted by appellee; it remained the duty of the parties to make themselves aware of the status of their cases. *Arnold v. Camden News Publ. Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003).

Appeal was dismissed because the trial court did not have the authority to set aside its original summary judgment order issued several years after the hearing on the matter and issue a duplicate order over one year later so that appellants' notice of appeal would be considered timely. *Barnett v. Monumental Gen. Ins. Co.*, 81 Ark. App. 23, 97 S.W.3d 901 (2003), appeal dismissed 354 Ark. 692, 128 S.W.3d 803 (2003).

Appellate court was precluded from considering buyer's argument concerning the trial court's denial of his motion to set aside where buyer did not timely file a motion to set aside; subdivision (b)(2) of this rule states that a party who sought to appeal from the grant or denial of the motion had 30 days to amend the previously filed notice, and no amended notice of appeal was contained in the record. *Gore v. Heartland Cmty. Bank*, 356 Ark. 665, 158 S.W.3d 123 (2004).

In a partition action, because couples' motion to set aside the sale was not filed within 10 days of the trial court's December 6, 2002, order confirming the sale, but rather was filed 28 days later, it was insufficient to extend the time to file their notice of appeal; the confirmation of the decree and report of sale was conclusive of any issue which might and should have been raised in opposition to the confirmation. In re *Partition of Real Prop.*, 88 Ark. App. 303, 198 S.W.3d 567 (2004).

Because seller failed to file a timely motion for judgment notwithstanding the verdict and a new trial in purchaser's fraud action against it, the time to file its notice of appeal was not extended under this rule, and failure to file a notice of appeal within 30 days of the August 3, 2005, judgment required the appellate court to dismiss the appeal because it lacked jurisdiction to consider it. *River Valley Motors, Inc. v. Ramey*, 96 Ark. App. 180, 239 S.W.3d 555 (2006).

Appeal was dismissed as untimely because, even though appellant filed its notice of appeal within the time granted by the circuit court, under subdivision (b)(3) of this rule, the circuit court could only extend the time for fourteen days from the entry of the order extending the time; appellant filed its notice on the fifteenth day. *River Valley Homes, Inc. v. Freeland-Kauffman & Fredeen, Inc.*, 2010 Ark. App. 682, — S.W.3d —, 2010 Ark. App. LEXIS 732 (Oct. 20, 2010).

Employer's attempt to lodge a record with clerk of the court was untimely under Ark. R. App. P. Civ. 5(b)(2) as it was more than 7 months after date upon which a timely postjudgment motion was disposed. A subse-

quent order on attorney's fees was a collateral matter, which did not extend the time to file a notice of appeal under subdivision (b)(1) of this rule. *Midwest Terminals of Toledo, Inc. v. Palm*, 2011 Ark. 81, — S.W.3d —, 2011 Ark. LEXIS 76 (Feb. 24, 2011).

Former attorney's appeal from a probate court's order striking the former attorney's response to a motion for modification and declaratory judgment and discovery requests was dismissed with prejudice because (1) the order striking the response was the only issue raised on appeal, (2) the order striking the response was an appealable order, under Ark. R. App. P. Civ. 2(a)(4), (3) the order striking the response was not reviewable under § 28-1-116(d) as being an appealable order entered prior to a final order of distribution, as no final order of distribution meeting the requirements of § 28-53-104 was entered, (4) even if the contested order were viewed as an order of a probate court, rather than an order striking a response, the appeal was still untimely, as the order was appealable at the interlocutory stage, under Ark. R. App. P. Civ. 2(a)(12) and § 28-1-116, and (5) the appeal was not timely filed under subsection (a) of this rule. *Brown v. Wilson (In re Estate of Stinnett)*, 2011 Ark. 278, — S.W.3d —, 2011 Ark. LEXIS 251 (June 23, 2011).

Post-Trial Motions.

Where the final judgment was entered after the filing of and hearing on the post-trial motions and incorporated the ruling of the trial court as to post-trial motions, the appellant would not be held to strict compliance with the 30-day waiting period, where no formal order regarding post-trial motions was entered. *First Pyramid Life Ins. Co. v. Stoltz*, 308 Ark. 260, 822 S.W.2d 389 (1992).

Where judgment was entered on July 27, and the notice of appeal was filed on August 17, i.e., within 30 days of the July 27 decree, but a motion to vacate judgment was filed on August 6 and deemed denied on September 5, then to effectively appeal the July 27 order, a new notice of appeal should have been filed during the time period of September 5 through October 5. *Scherz v. Mundaca Inv. Corp.*, 318 Ark. 595, 886 S.W.2d 631 (1994).

A post-trial motion permitted by subsection (b) of this rule may be timely amended, but that amendment will relate back to the date the original post-trial motion was filed and will not extend the time for filing the notice of appeal as provided in subsection (c) of this rule. *Williams v. Hudson*, 320 Ark. 635, 898 S.W.2d 465 (1995).

Where appellee's August 9 motion for judgment n.o.v. or a new trial was timely filed within 10 days of the August 5 judgment, but the trial court neither granted nor denied the motion within 30 days of its filing, so that the motion was deemed denied as of the 30th day,

September 8, 1993, the trial court's failure to act on appellee's motion within 30 days of its filing resulted, by operation of law, in that court's loss of jurisdiction to decide the motion; therefore, the September 23 order purporting to grant appellee's motion for judgment n.o.v. was void and of no effect. *Farm Bureau Mut. Ins. Co. v. Sudrick*, 49 Ark. App. 84, 896 S.W.2d 452 (1995).

Notice of appeal filed prior to the disposition of a post-trial motion had no effect, and where no new notice of appeal was filed within the prescribed time dated from the entry of the order dealing with the post-trial motion or from the expiration of thirty days allowed in the absence of a ruling, the appellant failed to file a timely notice of appeal. *K.M. v. State*, 49 Ark. App. 100, 896 S.W.2d 906 (1995).

Trial court erred in refusing to issue findings of fact and conclusions of law upon receipt of a timely request therefore following a bench trial; recognizing that its holding in *Price v. Garrett*, 79 Ark. App. 84, 84 S.W.3d 63 (2002), contained language that was contradictory to its holding in the present case, the appellate court limited the holding in *Price* to the rule that a post-judgment motion for findings of fact and conclusions of law made under ARCP 52(a) did not extend the time for filing a notice of appeal under this rule, and overruled *Price* to the extent that it conflicted with the present opinion. *Apollo Coating RCS, Inc. v. Brookridge Funding Corp.*, 81 Ark. App. 396, 103 S.W.3d 682 (2003).

Although appellant failed to timely file the notice of appeal after entry of judgment, pursuant to subsection (a) of this rule, this time was extended under subdivision (b)(1) of this rule because appellant's timely posttrial motions had sought to vacate the judgment on the grounds of misconduct; the Court looked to the substance of these motions in making its decision, and not the label attached thereto. *Davidson Props., LLC v. Summers*, 368 Ark. 283, 244 S.W.3d 674 (2006).

While a father raised his arguments in his motion to reconsider the dismissal of his complaint against a mother for an accounting of the funds in two bank accounts that were in their child's name, the arguments raised in that motion were not properly before an appellate court; the father did not file an amended notice of appeal after his motion for reconsideration was denied, as required by subdivision (b)(2) of this rule. *Chavis v. Brackenbury*, 375 Ark. 457, 291 S.W.3d 570 (2009).

Physician's appeal of the denial of a motion to set aside a trial court's dismissal of his injunction suit against health-benefit plans was dismissed as untimely because the motion fell within the deemed-denied provision of subdivision (b)(1) of this rule, and his

appeal was filed more than 30 days after the motion was deemed denied. The trial court's order denying the motion lacked jurisdiction because it was entered outside the 30-day deemed-denied period. *Davis v. Ark. Blue Cross & Blue Shield*, 2010 Ark. App. 348, — S.W.3d —, 2009 Ark. App. LEXIS 1063 (Apr. 21, 2009).

Because a father did not amend his notice of appeal, which was filed before his postjudgment motion for relief was deemed denied, to include the denied postjudgment motion, the arguments raised in the postjudgment motion concerning the amount of child support and the effective date could not be addressed on appeal under subsection (b) of this rule. *Wilson v. Powers*, 2012 Ark. App. 351, — S.W.3d —, 2012 Ark. App. LEXIS 457 (May 16, 2012).

Relation to Ark. R. Civ. P. 60.

Where a former husband sought clarification of a trial court's decision to order him to cease his contemptuous conduct relating to violating a contractual provision in a divorce decree or a modification under Ark. R. Civ. P. 60(a) as a miscarriage of justice, he was not seeking to circumvent the time constraints of this rule. *Rownak v. Rownak*, 103 Ark. App. 258, 288 S.W.3d 672 (2008).

Sentences.

In criminal cases, an aggrieved party may seek relief to correct a sentence illegal on its face at any time, but must petition within 120 days to seek relief from a sentence imposed in an illegal manner; the corollary to that rule is that the trial court is without jurisdiction to modify a sentence once it has been put into execution. *Pannell v. State*, 320 Ark. 250, 897 S.W.2d 552 (1995).

Workers' Compensation Cases.

The Rules of Appellate Procedure are broad and general in their scope while § 11-9-711 may be characterized as a special statute governing appeals only in workers' compensation cases; in such cases, the special statute was intended to remain in force as an exception to the latter and more general enactment. *Sunbelt Couriers v. McCartney*, 31 Ark. App. 8, 786 S.W.2d 121, aff'd 798 S.W.2d 92 (1990).

The Arkansas Supreme Court did not intend that Ark. Code Ann. § 11-9-711(b) be superseded by this Rule. *Sunbelt Couriers v. McCartney*, 31 Ark. App. 8, 786 S.W.2d 121, aff'd 798 S.W.2d 92 (1990).

The specific provision in the Workers' Compensation Act, providing that a notice of appeal may be filed within 30 days of the "receipt" of the order or award of the commission, controls, rather than the provision in this rule that requires the notice of appeal to be filed within 30 days from the "entry" of the judg-

ment appealed from. *McCarty v. Board of Trustees*, 45 Ark. App. 102, 872 S.W.2d 74 (1994).

Cited: *Hurst v. Hurst*, 269 Ark. 778, 602 S.W.2d 137 (1980); *Ashcraft v. Quimby*, 2 Ark. App. 174, 617 S.W.2d 390 (1981); *First State Bank v. Shaver*, 280 Ark. 476, 659 S.W.2d 504 (1983); *Simmons First Nat'l Bank v. Liberty Mut. Ins. Co.*, 282 Ark. 194, 667 S.W.2d 648 (1984); *Camp v. Tucker*, 283 Ark. 270, 674 S.W.2d 938 (1984); *Magness v. Masonite Corp.*, 12 Ark. App. 117, 671 S.W.2d 230 (1984); *Webb v. Webb*, 285 Ark. 164, 685 S.W.2d 514 (1985); *Perry v. State*, 287 Ark. 384, 699 S.W.2d 739 (1985); *Ward v. State*, 290 Ark. 185, 717 S.W.2d 492 (1986); *Broadhead v. McEntire*, 19 Ark. App. 259, 720 S.W.2d 313 (1986); *Hayden v. Hayden*, 291 Ark. 582, 726 S.W.2d 287 (1987); *Venhaus v. Pulaski County Quorum Court*, 292 Ark. 296, 729 S.W.2d 13 (1987); *Cigna Ins. Co. v. Brisson*, 294 Ark. 504, 744 S.W.2d 716 (1988); *Taylor v. State*, 296 Ark. 541, 757 S.W.2d 959 (1988); *Arkansas Dep't of Human Servs. v. Shipman*, 25 Ark. App. 247, 756 S.W.2d 930 (1988); *Wiggins v. State*, 299 Ark. 180, 771 S.W.2d 759 (1989); *Ferguson v. Sunbay Lodge, Ltd.*, 301 Ark. 87, 781 S.W.2d 491 (1989); *Blevins v. UIS*, 29 Ark. App. 102, 780 S.W.2d 584 (1989); *Ozark Acoustical Contractors v. National Bank of Commerce*, 301 Ark. 472, 786 S.W.2d 813 (1990); *Hawkins v. State Farm Fire & Cas. Co.*, 302 Ark. 582, 792 S.W.2d 307 (1990); *Brawley v. State*, 303 Ark. 58, 791 S.W.2d 712 (1990); *Williams v. Luft Constr. Co.*, 31 Ark. App. 198, 790 S.W.2d 921 (1990); *Phillips v. Jacobs*, 305 Ark. 365, 807 S.W.2d 923 (1991), overruled in part *Lord v. Mazzanti*, 2 S.W.3d 76 (1999); *Wicoff v. State*, 306 Ark. 401, 814 S.W.2d 267 (1991); *Chism v. State*, 310 Ark. 378, 834 S.W.2d 155 (1992); *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992); *Mitchell v. Mitchell*, 40 Ark. App. 81, 842 S.W.2d 66 (1992); *Alberty v. Wideman*, 312 Ark. 434, 850 S.W.2d 314 (1993); *In re Estate of Spears*, 314 Ark. 54, 858 S.W.2d 93 (1993); *Sunland Enters., Inc. v. Andrews*, 314 Ark. 229, 861 S.W.2d 311 (1993); *Jackson v. State*, 314 Ark. 407, 863 S.W.2d 283 (1993); *Handy v. State*, 43 Ark. App. 166, 862 S.W.2d 291 (1993); *McDonald's Corp. v. Hawkins*, 315 Ark. 487, 868 S.W.2d 78 (1994); *Woods v. State*, 316 Ark. 705, 873 S.W.2d 562 (1994); *Rowe v. State*, 317 Ark. 46, 874 S.W.2d 375 (1994); *Combs v. State*, 317 Ark. 286, 878 S.W.2d 378 (1994); *Arkansas Dep't of Human Servs. v. Bailey*, 318 Ark. 374, 885 S.W.2d 677 (1994); *King v. State*, 321 Ark. 617, 906 S.W.2d 306 (1995); *Hinson v. Eaton*, 322 Ark. 331, 908 S.W.2d 646 (1995); *Johnson v. State*, 322 Ark. 818, 911 S.W.2d 593 (1995); *Barnes v. State*, 322 Ark. 814, 912 S.W.2d 405 (1995); *Glover v. Langford*, 49 Ark. App. 30, 894 S.W.2d 959 (1995); *Budget Tire & Supply Co.*

v. First Nat'l Bank, 51 Ark. App. 188, 912 S.W.2d 938 (1995); Craig v. Traylor, 323 Ark. 363, 915 S.W.2d 257 (1996), questioned Privett v. Excel Specialty Prods., 69 S.W.3d 445 (2002); Collins v. State, 324 Ark. 322, 920 S.W.2d 846 (1996); Dodson v. State, 326 Ark. 637, 934 S.W.2d 198 (1996); Winans v. Winans, 55 Ark. App. 272, 934 S.W.2d 546 (1996); Sellers v. Faulkner County Circuit Court, 330 Ark. 95, 950 S.W.2d 805 (1997); Slaton v. Slaton, 330 Ark. 287, 956 S.W.2d 150 (1997); Colvin v. State, 330 Ark. 709, 958 S.W.2d 297 (1997); Home Mut. Fire Ins. Co. v. Jones, 63 Ark. App. 221, 977 S.W.2d 12 (1998); Harold Ives Trucking Co. v. Pro Transp., Inc., 341 Ark. 735, 19 S.W.3d 600 (2000); Larscheid v. Arkansas Dep't of Human Servs., 343 Ark. 580, 36 S.W.3d 308 (2001); Byndom v. State, 344 Ark. 391, 39 S.W.3d 781 (2001); Lee v. Konkel-Swaim, 73 Ark. App. 429, 43 S.W.3d 767 (2001); Holt Bonding Co. v. State, 353 Ark. 136, 114 S.W.3d 179 (2003); Barnett v. Howard, 353 Ark. 756, 120 S.W.3d 564 (2003); Tate-Smith v. Cupples, 355 Ark. 230, 134 S.W.3d 535 (2003); Hurst v. Dixon, 357 Ark. 439, 182 S.W.3d 102 (2004); Kelly v. Morrison, 83 Ark. App. 125, 118 S.W.3d 155 (2003); Jones v. Billingsley, 363 Ark. 96, 211 S.W.3d 508 (2005); Gangi v. Edmonds, 93 Ark. App. 217, 218 S.W.3d 339 (2005); Bulsara v. Watkins, 370 Ark. 461, 261 S.W.3d 461 (2007); Reeve v. Carroll County, 373 Ark. 584, 285 S.W.3d 242 (2008); Dobbins v. Democratic Party of Ark., 374 Ark. 496, 288 S.W.3d 639 (2008); Cruse v. 451 Press, LLC, 2010 Ark. App. 115, — S.W.3d —, 2010 Ark. App. LEXIS 108 (Feb. 3, 2010); Gilliam v. Gilliam, 2010 Ark. App. 137, — S.W.3d —, 2010 Ark. App. LEXIS 126 (Feb. 11, 2010); Kuelbs v. Hill, 2010 Ark. App. 427, — S.W.3d —, 2010 Ark. App. LEXIS 418 (May 12, 2010); Combined Healthcare Fed. Credit Union v. Arands Corp., 2011 Ark. App. 277, — S.W.3d —, 2011 Ark. App. LEXIS 294 (Apr. 13, 2011); Horton v. Horton, 2011 Ark. App. 361, — S.W.3d —, 2011 Ark. App. LEXIS 385 (May 11, 2011).

Rule 5. Record — Time for filing.

(a) *When filed.* The record on appeal shall be filed with the clerk of the Arkansas Supreme Court and docketed therein within 90 days from the filing of the first notice of appeal, unless the time is extended by order of the circuit court as hereinafter provided. When, however, an appeal is taken from an interlocutory order under Rule 2(a)(6) or (7), the record must be filed with the clerk of the Supreme Court within thirty (30) days from the entry of such order.

(b) *Extension of time.*

(1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period prescribed by subdivision (a) of this rule or a prior extension order, may extend the time for filing the record only if it makes the following findings:

(A) The appellant has filed a motion explaining the reasons for the requested extension and served the motion on all counsel of record;

(B) The time to file the record on appeal has not yet expired;

(C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;

(D) The appellant, in compliance with Rule 6(b), has timely ordered the stenographically reported material from the court reporter and made any financial arrangements required for its preparation; and

(E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal or for the circuit clerk to compile the record.

(2) In no event shall the time be extended more than seven (7) months from the date of the entry of the judgment or order, or from the date on which a timely postjudgment motion is deemed to have been disposed of under Rule 4(b)(1), whichever is later.

(3) If the appellant has obtained the maximum seven-month extension available from the circuit court, or demonstrates (by affidavit or otherwise) an inability to obtain entry of an order of extension, then before expiration

of the period prescribed by subdivision (a) of this rule or a prior extension order, the appellant may file with the clerk of the Supreme Court a petition for writ of certiorari pursuant to Rule 3-5 of the Rules of the Supreme Court and Court of Appeals.

(c) *Partial record.* Prior to the time the complete record on appeal is filed with the clerk of the Arkansas Supreme Court as provided in this rule, any party may docket the appeal to make a motion for dismissal or for any other intermediate order by filing a partial record with the clerk. At the request of the moving party, the clerk of the circuit court that entered the judgment, decree, or order from which the appeal is taken shall certify the portion of the record designated by that party as being a true and correct copy. It shall be the responsibility of the moving party to transmit the certified partial record to the clerk of the Arkansas Supreme Court. (Amended May 20, 1985; amended July 7, 1986, effective September 15, 1986; adopted and amended July 10, 1995, effective January 1, 1996; amended January 27, 2000; amended June 7, 2001, effective July 1, 2001; amended March 13, 2003; amended May 25, 2006; amended May 24, 2012, effective July 1, 2012.)

Publisher's Notes. The Arkansas Supreme Court in a per curiam order of June 28, 1982 held that when the record in a criminal appeal is not filed on time owing to the fault of counsel and counsel admits that the complete fault is his, the court would permit the brief to be filed, publish a per curiam giving the name of the lawyer and send a copy to the Committee on Professional Responsibility to be kept in its files for the Committee's information if a complaint of any kind should later be filed against that lawyer.

Reporter's Notes to Rule 5 (1995): This rule tracks former Appellate Rule 5 without change. The Reporter's Notes prepared in connection with former Appellate Rule 5 are set out below.

Reporter's Notes (as revised by the Court) to Rule 5: 1. Rule 5 is a slightly revised version of superseded *Ark. Stat. Ann.* 27-2127.1 (Supp. 1975) and superseded Rule 26A of the Arkansas Supreme Court Rules. Only minor wording changes are made and the substance of prior Arkansas law remains unchanged. Under Section (b), the order extending the time must actually be filed prior to the expiration of the time for filing the record, whereas under prior Arkansas law, the order of extension needed only to have been made within the time allowed and not necessarily filed.

2. The 30-day limitation for the filing of the record in appeals from certain interlocutory orders is taken from superseded *Ark. Stat. Ann.* 27-1202 (Repl. 1962).

Addition to Reporter's Notes, 1985 Amendment: The next to last sentence of Rule 5(b) is amended to eliminate confusion that had existed regarding the interplay between Rule 4, which governs the filing of the notice of appeal, and Rule 5, which governs the time for filing the record with the clerk of

the Supreme Court. As amended, Rule 5(b) provides that the time for filing the record may not be extended more than seven months from either (a) the date of entry of judgment or order, or (2) the date on which a timely postjudgment motion under Rule 4(b) has been deemed disposed of under Rule 4(c), whichever is later. See *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985).

Addition to Reporter's Notes, 1986

Amendment: The new language is designed to address a problem stemming from the relationship between Appellate Rules 4 and 5. Under prior practice and under certain circumstances, Rule 5 required that the record on appeal be filed before Rule 4(c) required the filing of a notice of appeal in the trial court. See *Yent v. State*, 650 S.W.2d 577, 279 Ark. 268 (1983) (concurring opinion). While the most recent amendment to Rule 5(b) was aimed at this anomaly, difficulties persist when the postjudgment motion is (1) limited to a single issue, although other errors are to be presented on appeal, and (2) the trial court properly takes under advisement such a motion. In such a situation, counsel for the appellant must lodge the record on appeal within seven months from the date of the original judgment in order to preserve an error not raised in the motion for new trial, even though the time for filing the notice of appeal would not begin to run until disposition of the motion, which under Rule 4(c) could occur more than seven months after entry of judgment. Under the amended rule, however, an appeal from the order disposing of the motion raises not only the issue presented by the motion, but also other issues properly preserved at trial. The time for filing the record on appeal would run from disposition of the motion.

Addition to Reporter's Notes, 2000

Amendment: New subdivision (c) requires the filing of a partial record in the appellate court in connection with a motion to dismiss or for any other intermediate relief. It reflects prior case law and thus does not work any change in appellate practice. *See, e.g., Mitchell v. City of Mountain View*, 304 Ark. 585, 803 S.W.2d 556 (1991); *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992); *Green v. Williford*, 331 Ark. 533, 961 S.W.2d 766 (1998). The new provision is based on Rule 4(c) of the Arkansas Rules of Appellate Procedure—Criminal but departs from that rule by placing on the moving party the burden of transmitting the certified partial record to the appellate court. This requirement is consistent with Rule 7(b) of the Arkansas Rules of Appellate Procedure—Civil.

Addition to Reporter's Notes, 2001

Amendment: The term "trial court" in subdivisions (a), (b), and (c) has been replaced with "circuit court." Constitutional Amendment 80 established the circuit courts as the "trial courts of original jurisdiction" in the state and abolished the separate chancery and probate courts. Subdivision (c) has been further revised by specifying that certification of the partial record shall be made by the clerk of "the circuit court that entered the judgment, decree, or order from which the appeal is taken." In most cases, the circuit clerk serves as clerk of the circuit court. However, in some counties the county clerk handles probate matters. This division of labor is discussed in the 2001 Reporter's Note accompanying Rule 3 of the Rules of Civil Procedure.

Addition to Reporter's Notes, 2003

Amendment: Subdivision (b) has been divided into three paragraphs and revised to clarify the steps necessary to obtain an extension of time for filing the record on appeal. The first and second paragraphs do not change the circumstances under which such an extension is permissible, but the first paragraph specifies the findings that the circuit court must make. *See Murphy v. Dumas*, 343 Ark. 608, 36 S.W.3d 351 (2001). Under the third paragraph, which is new, an appellant may file a petition for writ of certiorari in the Supreme Court if he or she cannot obtain an extension order prior to the applicable deadline.

Deleted from subdivision (b) is a provision that an appeal from an order disposing of a postjudgment motion "brings up for review the judgment, decree and any intermediate order involving the merits and necessarily affecting the judgment, as well as the order appealed from." This language now appears in Rules 2(b) and 3(a).

Addition to Reporter's Notes, 2006

Amendment: Rule 5(b)(3) has been revised to embody the holding of *Coggins v. Coggins*, 353 Ark. 431, 108 S.W.3d 588 (2003) (per curiam). Before the supreme court will accept a partial record and entertain a petition for a writ of certiorari to complete the record, the appellant must exhaust all extensions available from the circuit court or show that no extension could be obtained. In the latter situation, the appellant must demonstrate that, notwithstanding a good faith effort to get the record prepared on time and secure all available extensions of the record due date from the circuit court, the appellant was unable to get an extension order entered. The appellant should make this showing with references to the partial record filed with the supreme court and, if necessary, an affidavit describing the circumstances.

Addition to Reporter's Notes, 2012

Amendment: Arkansas Rule of Appellate Procedure—Civil 5(b)(1)(E) is revised to give the circuit court authority to extend the time for filing the record on appeal when necessary for the circuit clerk to compile the record. The rule previously gave that authority to the circuit court only when necessary for the court reporter to include the stenographically reported material in the record on appeal. However, in its per curiam opinion of *Bowman v. Centennial Bank*, 2011 Ark. 34, the Arkansas Supreme Court noted that the rule failed to address the situation when the circuit clerk needs additional time to compile the record. To extend the time for filing the record on appeal because the circuit clerk needs additional time, the circuit court must make the same prerequisite findings under Rule 5(b)(1)(A) through (E) required for granting extension of time for filing the record when the court reporter needs additional time to compile the record.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Civil Procedure, 10 U. Ark. Little Rock L.J. 105.

CASE NOTES

ANALYSIS

Purpose.
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Purpose.

The purpose of this rule is to eliminate unnecessary delay in the docketing of appeals and compliance with this rule is expected so that lawsuits may proceed as expeditiously as possible. *Alexander v. Beaumont*, 275 Ark. 357, 629 S.W.2d 300 (1982).

Applicability.

Subdivision (b)(1) of this rule applies to both civil and criminal cases for the determination of the timeliness of a record on appeal. *Charles R. Griffith Farms, Inc. v. Grauman*, 373 Ark. 410, 284 S.W.3d 68 (2008).

Authority of Court.

The chancery court lacked authority to enter an order extending the time to file the record on appeal more than seven months from the date of entry of the decree. *Kissinger v. Turner*, 49 Ark. App. 1, 894 S.W.2d 614 (1995).

Dismissal.

If a would-be appellant, after filing notice of appeal, permits the appeal to become stale, it can avoid incurring further costs by seeking a dismissal in the trial court pursuant to ARAP 3(b). *Mitchell v. City of Mt. View*, 304 Ark. 585, 803 S.W.2d 556 (1991).

In the absence of unavoidable casualty, an appeal should be dismissed when the record is filed outside the statutory period. *Coggins v. Benton*, 45 Ark. App. 189, 873 S.W.2d 820 (1994).

Entry of Order.

Order extending the time for filing, granted on the 90th day, but not "entered" as required by subsection (b) of this rule, was not timely. *Willis v. State*, 323 Ark. 41, 912 S.W.2d 430 (1996).

Trial court's grant of an extension of time to an inmate was remanded to the circuit court

because the circuit court judge did not comply with subdivision (b)(1)(C) of this rule in that it did not find that all parties had had an opportunity to be heard on the motion. *White v. State*, 366 Ark. 295, 234 S.W.3d 882 (2006).

Where the circuit court's order extending the time to file the record did not include a statement that all parties had the opportunity to be heard on the motion, either at a hearing or by writing, the matter was remanded to the circuit court for compliance with the rule. *Munn v. State*, 368 Ark. 34, 242 S.W.3d 614 (2006).

Where appellant filed a motion for rule on clerk to file the record and have his appeal docketed, the court remanded his case to the trial court for compliance with subdivision (b)(1) of this rule because while the trial court entered an order extending appellant's deadline to file the record, the order made no reference to any findings of the trial court as required by subdivision (b)(1) of this rule. *Looney v. Bank of W. Memphis*, 368 Ark. 639, 249 S.W.3d 126 (2007).

Upon defendant's motion for rule on clerk, a matter was remanded to a circuit judge for compliance with subdivision (b)(1) of this rule because the order of extension of time for filing a transcript made no reference to the findings of the circuit court as required by subdivision (b)(1), and the Supreme Court of Arkansas expected strict compliance with the requirements of subsection (b) of this rule. *Griddine v. State*, 372 Ark. 513, 277 S.W.3d 567 (2008).

Extension of Time.

Where the petitioner's notice of appeal did not contain a statement that the transcript had been ordered as required by ARAP 3(e), and more than two months later the petitioner obtained an extension of time to docket the appeal, the extension of time for filing the record was in violation of subsection (b) of this rule, because the court did not make a finding that the reporter's transcript had been ordered. *Alexander v. Beaumont*, 275 Ark. 357, 629 S.W.2d 300 (1982).

The limitation in subsection (b) of this rule, that the trial court cannot extend the time for filing the record to a date more than seven months after the entry of the judgment, was not superseded or extended by ARAP 4(b) which provides for extension of time in connection with post-judgment motions, such as a motion for a new trial. The extension in ARAP 4(b) is only for the filing of the notice of appeal, not for lodging the record in the appellate court. *Yent v. State*, 279 Ark. 268, 650 S.W.2d 577 (1983), criticized *Pentron Corp. v. Delta Steel & Constr. Co.*, 689 S.W.2d

539 (1985). But see *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985).

Where appellants had not timely requested a reporter's transcript, even though their motion stated that it had been requested, the court did not abuse its discretion in denying their motion for an extension of time to file an appeal. *Hammock v. Grayson*, 284 Ark. 367, 681 S.W.2d 352 (1984).

Where record on appeal consisted only of pleadings and orders and contained no stenographically reported portions, the trial court was without authority to extend the time to file the record pursuant to subsection (b) of this rule. *Jordan v. White River Medical Ctr.*, 301 Ark. 292, 783 S.W.2d 836 (1990).

Where the trial court signed an order extending the time to file a transcript within the 90-day period, but it was not entered within that period by filing the order with the clerk of court in which the case was tried, the appellant's tender of the transcript was properly denied by the clerk. *Voyles v. Voyles*, 311 Ark. 186, 842 S.W.2d 21 (1992).

Where appellant obtained an extension from the chancery court to file her record, but the extension date was to nearly eight months after the parties' divorce decree had been entered, and where no post-judgment motions were filed, then, even though the supreme court clerk's office improperly failed to reject her untimely tendered record, the appellant's failure to lodge a timely record was jurisdictional, and the appeal dismissed. *Morris v. Stroud*, 317 Ark. 628, 883 S.W.2d 1 (1994).

The trial court improperly extended the time for filing the record to a time which was outside the statutory period, where the court had no authority to take that action; when an appellant seeks an extension of time beyond the statutory period to file the record, the remedy is to file a partial record in the supreme court and to seek an extension for a compelling reason, such as unavoidable casualty. *Coggins v. Benton*, 45 Ark. App. 189, 873 S.W.2d 820 (1994).

The trial court's grant of a seven months' extension to file an appeal without a hearing and without proof that the transcript had been ordered was in violation of this rule. *Jacobs v. State*, 321 Ark. 561, 906 S.W.2d 670 (1995).

Although RAP-Civ 4(b) and subsection (b) of this rule provide for extensions in both filing the notice of appeal and filing the record that is designated therein, their applicability is limited by the type of post-judgment motions that are filed. *Pennington v. Harvest Foods, Inc.*, 322 Ark. 820, 913 S.W.2d 758 (1995).

Order which did not arise out of a motion for judgment notwithstanding the verdict under ARCP 50(b), out of a motion to amend the

court's findings of fact or to make additional findings under ARCP 52(b), or out of a motion for a new trial under ARCP 59(b), was not an order disposing of a postjudgment motion under ARAP 4 and did not bring up for review an earlier order; therefore, the filing of the record on appeal was outside the seven-month maximum period allowed for that purpose by subsection (b) of this rule with respect to the earlier order. *Smith v. Smith*, 51 Ark. App. 20, 907 S.W.2d 755 (1995).

Where former attorney neither gave notice of appeal nor filed the record and, further, after Supreme Court denied the rule on the clerk and directed counsel to file a motion for a belated appeal, counsel waited another five months to file this motion for belated appeal, court would grant petitioner's motion for belated appeal. *Mayfield v. State*, 323 Ark. 801, 918 S.W.2d 125 (1996).

Pursuant to subsection (b) of this rule, in cases where there has been designated for inclusion any evidence or proceeding at the trial or hearing which was stenographically reported, the trial court, upon finding that a reporter's transcript of such evidence or proceeding has been ordered by appellant(s), and upon a further finding that an extension is necessary, may extend the time for filing the record on appeal, but the order of extension must be entered before the expiration of the period for filing as originally prescribed or extended by a previous order. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 336 Ark. 55, 984 S.W.2d 410 (1999).

Where appellants obtained an order extending the time to file the record on appeal within 90 days of the date of their notice of appeal, they obtained a timely extension of the time within which to file the record. *Jones v. Abraham*, 67 Ark. App. 304, 999 S.W.2d 698 (1999), *aff'd*, 341 Ark. 66, 15 S.W.3d 310 (2000), overruled in part, *Lamontagne v. Ark. Dep't of Human Servs.*, 2010 Ark. 190, — S.W.3d — (2010).

Appellants were procedurally precluded from pursuing their appeal where an extension of time for them to file the record on appeal was not entered until after the expiration of the original filing period and the appellants themselves never requested the extension. *Osburn v. Arkansas Dep't of Human Servs.*, 341 Ark. 218, 15 S.W.3d 673 (2000).

Where the defendant's attorney admitted that the record was tendered late due to a mistake on his part, the defendant established good cause on a motion for extension of time to file the record. *Pemberton v. State*, 341 Ark. 743, 19 S.W.3d 36 (2000).

Because there was nothing stenographically reported that was to be included in the record filed with the clerk's office, the trial court should not have granted an extension of time and, because the extension was im-

proper, the record was lodged outside the ninety days allowed by the rule. *Seay v. Wildlife Farms, Inc.*, 342 Ark. 503, 29 S.W.3d 711 (2000).

An extension of time to file a record of appeal was void where it was entered without a request by the appellants or a hearing; however, the court properly refused to dismiss the appeal where the appellants relied on the extension of time and there was nothing to suggest that they relied on the extension order in bad faith. *Murphy v. Dumas*, 343 Ark. 608, 36 S.W.3d 351 (2001).

The Arkansas Supreme Court declined to issue a writ of certiorari to complete the record on appeal: pursuant to subsection (b) of this rule, the first recourse for an ex-spouse who appealed a divorce order was to seek from the trial court a second extension of the time to file the record, but the ex-spouse failed to show that he could not obtain, or had even sought, from the trial court a second extension of the deadline, and although the reason given for the failure to timely file a complete record was that the court reporter had not completed the transcript, pleadings and other documents also were omitted from the partial record filed with the petition. *Coggins v. Coggins*, 353 Ark. 431, 108 S.W.3d 588 (2003).

When defendant's attorney learned that a pro se notice of appeal had been filed, the attorney should have sought an extension of time from the circuit court to file the record, rather than filing a petition for a writ of certiorari to complete the record. *Moore v. State*, 360 Ark. 261, 200 S.W.3d 891 (2005).

Petitioner was not entitled to a writ of certiorari to complete the record in his appeal from a criminal conviction because he had not complied with the provisions of subsection (b) of this rule; petitioner made no showing that he was unable to obtain entry of an order from the trial court further extending the time to file the record. *Camp v. State*, 361 Ark. 88, 204 S.W.3d 518 (2005).

Where petitioner brought a petition for rehearing after the appellate court denied his petition to complete the record, the case was remanded for the circuit court to make additional findings to show whether petitioner met the requirements of subsection (b) of this rule for obtaining an extension of time to file the record. *Camp v. State*, 362 Ark. 100, 207 S.W.3d 454 (2005).

Although criminal defendant's counsel failed to follow subdivision (b)(2) of this rule, a final 30-day extension was appropriate so that the court reporter could complete the record; however, the matter was referred to the State Board of Court Reporter Examiners because, in the past 14 months, at least five other petitions for writs of certiorari had been granted, extending the due dates for filing the complete record from 70 days to more than

120 days past the seven-month period because defendant's attorney was unable to meet the deadlines. *Petras v. State*, 363 Ark. 373, 214 S.W.3d 264 (2005).

Writ of certiorari was granted to petitioner in a kidnapping and attempted rape case pursuant to Ark. Sup. Ct. & Ct. App. R. 3-5 allowing petitioner an additional 30 days to complete the record because, after the deadline for preparation of the record had been extended by 120 days, the record was still not completed; subdivision (b)(3) of this rule allowed the petitioner to seek certiorari for purposes of extending the time. *Mitchem v. State*, 363 Ark. 451, 214 S.W.3d 855 (2005).

Where the two orders of extension in the instant case made no reference to the findings of the circuit court, as required under subdivision (b)(1)(C) of this rule, the Arkansas Supreme Court remanded the motion for rule on clerk for compliance with the rule; further, the Court made it very clear that it expected strict compliance. *Hairgrove v. Oden*, 365 Ark. 53, 223 S.W.3d 827 (2006).

Grant of individual's motion on the clerk for an extension of time was reversed and remanded as the circuit court judge failed to indicate whether all parties had had the opportunity to be heard on the motion, as required by subdivision (b)(1)(C) of this rule. *Rackley v. State*, 366 Ark. 232, 234 S.W.3d 314 (2006).

Where the circuit judge extended the deadline to seven months from the date of judgment and commitment but there was nothing in the order to indicate that all parties had an opportunity to be heard on the motion, either at a hearing or by responding in writing, the case was remanded for compliance with this rule. *McCrackin v. State*, 367 Ark. 366, 240 S.W.3d 97 (2006).

Appellate court remanded inmate's rule on the clerk back to the trial court judge as the judge did not comply with subdivision (b)(1)(C) of this rule; the judge did not indicate that all parties had had the opportunity to be heard on inmate's motion to extend the time for the inmate to file the record. *Lalota v. State*, 367 Ark. 418, 240 S.W.3d 574 (2006).

Where the clerk refused to docket the appeal and accept the record based on a failure to comply with subdivision (b)(1) of this rule, the Court would not grant defendant's motion for rule on clerk; the orders extending the time for filing the record failed to state that a hearing was held or that the state agreed to entry of the order. *Russell v. State*, 368 Ark. 439, 246 S.W.3d 856 (2007).

Appellant's motion for rule on clerk was denied; pursuant to subdivision (b)(1) of this rule, there was no order extending the time in which to file the record, and the record was filed on January 19, 2007, past the December

27, 2006, deadline. *Mobley v. Dooley*, 368 Ark. 678, 249 S.W.3d 808 (2007).

Record on appeal was lodged because, while the order extending time to file the record did not comply with subdivision (b)(1)(C) of this rule, the state's attorney stated in open court that the state had no objection to the motion for extension of time. *Sanders v. State*, 369 Ark. 423, 255 S.W.3d 444 (2007).

Action by the Arkansas Office of Child Support Enforcement against a father was remanded for compliance with subsection (b) of this rule where the trial court's orders of extension made no reference to each of the findings of the trial court, which was required by the rule. *Office of Child Support Enforcement v. Brown*, 370 Ark. 280, 258 S.W.3d 725 (2007).

Appellate courts expect strict compliance with the requirements of subsection (b) of this rule and do not view the granting of an extension as a mere formality. *Office of Child Support Enforcement v. Brown*, 370 Ark. 280, 258 S.W.3d 725 (2007).

Arkansas Supreme Court denied appellant's petition for a writ of certiorari to acknowledge the circuit court's continuing jurisdiction to grant a second extension of time to file the record of appeal because the circuit court did not have jurisdiction to extend the time for filing the record beyond seven months from the order appealed from under subdivision (b)(2) of this rule, but the Supreme Court granted the petition to file the record within 30 days because pursuant to subdivision (b)(3) of this rule, the Supreme Court could extend the time for filing the record beyond the seven-month period, if the petition to do so was filed within the seven months, and the amended petition for a writ of certiorari was filed in the court at the end of the seven-month period. *Bulsara v. Watkins*, 370 Ark. 461, 261 S.W.3d 461 (2007).

Motion for rule on clerk was denied because a supreme court clerk was correct in refusing to docket an appeal because, while a timely notice of appeal was filed, (1) a motion for extension was not filed with a circuit clerk before the expiration of the ninety-day deadline for filing the record, under subsection (a) of this rule; (2) because the motion for extension was untimely, a proper order extending the time could not have been properly filed, under subsection (b) of this rule; and (3) it was the duty of appellants' attorney to monitor the filing prior to the deadline, and the attorney failed to do so. *McCoy v. Carter Jones Timber Co.*, 370 Ark. 470, 261 S.W.3d 467 (2007).

Defendant appealed his conviction for two counts of rape. When the record was tendered to the state supreme court, the clerk correctly declined to lodge it because the lower court's order extending the time to file the record did

not comply with this rule. *Sparacio v. State*, 372 Ark. 114, 270 S.W.3d 840 (2008).

Because an order for extension of time to file the record on appeal made no reference to the findings of the circuit court as required by subdivision (b)(1) of this rule, a remand was required for compliance with the rule. *Horvath v. State*, 372 Ark. 179, 271 S.W.3d 524 (2008).

Circuit court lacked jurisdiction to grant an extension to file a record on appeal under subsection (a) of this rule because more than seven months had passed from the date of the filing of the notice of appeal and the order granting the extension did not resolve the question of whether all parties had an opportunity to be heard on the prior order. The petition for writ of certiorari was granted to order the record be filed; however, it was apparent that counsel was at fault for the failure to timely file the record, and therefore, as to counsel, the supreme court treated the petition for writ of certiorari as a motion for rule on clerk and forwarded a copy of the court's opinion to the Committee on Professional Conduct. *Rivers v. State*, 372 Ark. 183, 271 S.W.3d 520 (2008).

Where appellant filed a motion for rule on clerk, it was necessary to remand the matter to the trial judge for compliance with subdivision (b)(1) of this rule because the order of extension made no reference to the findings of the trial court, as required by subdivision (b)(1) of this rule. *Byrer v. Colvard*, 372 Ark. 460, 277 S.W.3d 209 (2008).

Order of extension of time entered by a circuit court was void because the requirements of this rule were not met because the request for extension was not properly brought by appellants. *Spurlock v. Riddell*, 373 Ark. 38, 280 S.W.3d 18 (2008).

Circuit court granted an extension of time pursuant to subsection (a) of this rule; however, the trial court erred because strict compliance with subdivision (b)(1) of this rule was necessary. *Simpson Hous. Solutions, LLC v. Hernandez*, 373 Ark. 196, 282 S.W.3d 806 (2008).

Where appellants did not comply with subdivision (b)(1) of this rule by failing to file a motion requesting an extension of time for filing the record on appeal, they failed to meet their burden of demonstrating that there was some error of fact or law that would merit reconsideration of the denial of their motion for rule on clerk. *Spurlock v. Riddell*, 373 Ark. 199, 282 S.W.3d 811 (2008).

Court clerk should have filed a movant's notice of appeal on the day the notice of appeal was filed from the denial of his motion for postconviction relief, whether or not the movant was allowed to proceed in forma pauperis. The motion to file a belated appeal was granted because, but for this clerical error,

the notice of appeal was timely filed. *White v. State*, 373 Ark. 415, 284 S.W.3d 64 (2008).

Dismissal of the hunter's appeal after the Arkansas Game and Fish Commission and its director canceled hunting season after it had already been approved was appropriate because the notice of appeal did not substantially comply with Ark. R. App. P. Civ. 3(e). There could be no compliance with R. 3(e) when the notice of appeal declared that the necessary financial arrangements had been made when, in reality, they had not been, Ark. R. App. P. Civ. 6(b); the hunter's counsel failed to make the necessary financial arrangements with the court reporter as represented in his notice of appeal until more than two months later after he had filed a motion for extension of time under subdivision (b)(1)(D) of this rule. *Clark v. Ark. Game & Fish Comm'n*, 2011 Ark. 279, — S.W.3d —, 2011 Ark. LEXIS 250 (June 23, 2011).

Failure to Timely File Record.

Where counsel did not comply with the proper procedure for filing the record in his client's appeal, in that he tendered the record two days after the filing deadline, his actions constitute ineffective assistance of counsel. *Worthington v. State*, 301 Ark. 354, 786 S.W.2d 117 (1990).

Where appellants had not filed the record with the clerk within 90 days of notice of appeal, and had not responded to appellee's motion to dismiss the appeal nor filed a request for an extension in which to file the record and none had been granted, the appellants were procedurally precluded from pursuing their appeal, and appellee's motion to dismiss the appeal had to be granted. *Mitchell v. City of Mt. View*, 304 Ark. 585, 803 S.W.2d 556 (1991).

The court denied appellant's motion for rule on the clerk requesting that the clerk be required to accept and file an appeal record since no variance from the 90 day rule is permitted and since the motion offered no explanation as to why the appellant was 37 days late in tendering the record. *Anderson v. Seward Luggage Co.*, 62 Ark. App. 186, 969 S.W.2d 683 (1998).

Where one appellant waited until after other appellants filed their record with the court clerk before it decided to contest the other appellants' motions for extension, the appellant's motion to dismiss was untimely and was thus denied. *Dugal Logging, Inc. v. Arkansas Pulpwood Co.*, 336 Ark. 55, 984 S.W.2d 410 (1999).

Although defendant argued on appeal that the trial court erred in appointing a receiver, defendant failed to timely file the record; thus, defendant was barred from pursuing this point on appeal. *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003).

Defendant should have tendered his record by April 3, 2003, which was 90 days after the notice of appeal was filed, which he failed to do; subsection (b) of this rule allowed for a later filing, but only if an order of extension had been entered before the expiration of the 90-day period mentioned in subsection (a) of this rule. *Welch v. State*, 353 Ark. 654, 111 S.W.3d 378 (2003), criticized *McDonald v. State*, 146 S.W.3d 883 (2004).

Supreme Court clerk was correct in finding that the time for filing the transcript for appeal began on October 27, 2003, making defendant's record due within 90 days from that date, January 26, 2004; since defendant did not tender her record until January 28, 2004, her appeal was untimely. *Waddle v. State*, 356 Ark. 501, 156 S.W.3d 226 (2004).

Mother's right to appeal the termination of her parental rights could not be conditioned on her ability to pay for the preparation of a record and, if she was unable to afford the preparation of a transcript, she could proceed in forma pauperis and the transcript would be furnished at the state's expense; further, because the court's decisions in another action came well after mother's extended time for filing the record had expired, the court allowed mother's appointed attorney to proceed with the appeal in a manner consistent with the procedures adopted by those decisions. *Childers v. Ark. Dep't of Human Servs.*, 360 Ark. 517, 202 S.W.3d 529 (2005).

Individual's appeal was properly dismissed as untimely where the record was not filed within 90 days from the filing of the first notice of appeal, as required by this rule. *Larry v. Grady Sch. Dist.*, 362 Ark. 65, 207 S.W.3d 451 (2005).

Despite the nonsuit petition filed by the health care company, there was no docketing of the record or order entered to extend the time for filing, as required under subsections (a) and (b) of this rule, and the tendered record was properly rejected due to untimeliness; thus, because the health care company did not tender the record in timely fashion, its motion for rule on the clerk was not well taken. *NCS Healthcare of Ark., Inc. v. W.P. Malone, Inc.*, 362 Ark. 169, 207 S.W.3d 552 (2005).

Where defendant failed to timely tender the record on appeal of his conviction for robbery and theft of property, it was plain from the motion for rule on clerk that there was error on the attorney's part. In accordance with subsection (a) of this rule, the state supreme court granted defendant's motion for rule on clerk; a copy of the opinion was forwarded to the Arkansas Supreme Court Committee on Professional Conduct. *Perez v. State*, 369 Ark. 182, 251 S.W.3d 304 (2007).

Where defendant's notice of appeal was timely filed but the record was not, the state

supreme court treated his motion for a belated appeal as a motion for rule on clerk. *Perez v. State*, 369 Ark. 182, 251 S.W.3d 304 (2007).

Pursuant to subdivision (b)(2) of this rule, defendant's attorney failed to file the record in a timely manner where the record was not tendered to the supreme court clerk until two days after the deadline; thus, defendant's motion for rule on the clerk was granted. *Mishion v. State*, 369 Ark. 481, 255 S.W.3d 869 (2007).

Where defendant conceded that he failed to file a timely transcript because his counsel did not give all parties an opportunity to be heard on his motion to extend the time for filing the transcript under subdivision (b)(1)(C) of this rule, the Arkansas Supreme Court granted his motion for a belated appeal. Because defendant did not comply with this rule until after the time expired for filing the record on appeal, his counsel was referred to the Supreme Court of Arkansas Committee on Professional Conduct. *Harrison v. State*, 370 Ark. 431, 260 S.W.3d 286 (2007).

Record plainly showed that defendant's attorney was at fault for failing to perfect the appeal as he failed to tender the record in a timely manner, subsection (a) of this rule. *Carroll v. State*, 371 Ark. 135, 263 S.W.3d 535 (2007).

Defendant's record on appeal was untimely under subsection (a) of this rule; however, defendant's motion for belated appeal was granted because her attorney failed to file the notice of appeal within 90 days of March 8, 2007. *Williford v. State*, 371 Ark. 23, 262 S.W.3d 614 (2007).

Clerk of the supreme court properly refused to file a record because it was tendered outside the time period for docketing the case based on the date the original judgment order was entered; however, defendant was not penalized for the fault of his attorney, which was clear from the record. *Morris v. State*, 373 Ark. 190, 282 S.W.3d 757 (2008).

Where defendant was convicted of two counts of rape and two counts of sexual assault, the judgment and commitment order was entered on May 5, 2008; the time for filing the record on appeal expired on August 27, 2008 in accordance with subsection (a) of this rule. Defendant's tender of the record on August 28, 2008 was untimely and counsel did not admit fault but his fault was clear from the record; therefore, the Supreme Court of Arkansas was permitted to grant defendant's motion for rule on clerk and the clerk was directed to accept the record. *Bryant v. State*, 374 Ark. 329, 287 S.W.3d 599 (2008).

Jurisdiction.

Debtors' appeal against bank was not timely and the appellate court was without jurisdiction to entertain the appeal where it

was separate from any action brought by the bank against debtors; 11 U.S.C.S. § 362 was not applicable and did not serve to toll the time debtors had to file their notice of appeal under this rule. *Dwiggins v. Elk Horn Bank & Trust Co.*, 364 Ark. 344, 219 S.W.3d 181 (2005).

Thirty days for landowners to file the record under subsection (a) of this rule or enter an order granting an extension of time ran on January 3, 2005, 30 days after the December 3, 2004, order; therefore, the March 21, 2005, order was untimely and landowners' appeal had to be dismissed. *Johnson v. Langley*, 93 Ark. App. 214, 218 S.W.3d 363 (2005).

Miscalculation of Time.

Where defendant's attorneys tendered the record of the case late due to their miscalculation of the seven-month maximum limit under this rule, such error was good cause to grant a motion for rule on the clerk. *Gibson v. State*, 272 Ark. 345, 614 S.W.2d 234 (1981).

Where defendant's attorney admitted that the record was tendered late due to his miscalculation of the seven-month maximum limit for filing the record in the Supreme Court, such error, admittedly made by the attorney for a criminal defendant, was good cause to grant the motion for rule on the clerk. *Robbins v. State*, 287 Ark. 199, 697 S.W.2d 118 (1985); *Grooms v. State*, 287 Ark. 220, 697 S.W.2d 894 (1985).

Where the defendant's attorney admitted that the record was tendered late due to his miscalculation of the 90-day limit for filing the record in the Supreme Court, such error, admittedly made by the attorney for a criminal defendant, was good cause to grant the motion for rule on the clerk. *Stewart v. State*, 288 Ark. 117, 702 S.W.2d 2 (1986); *Quigley v. State*, 295 Ark. 167, 747 S.W.2d 92 (1988); *Walker v. State*, 296 Ark. 303, 759 S.W.2d 791 (1988); *Grissom v. State*, 297 Ark. 390, 761 S.W.2d 606 (1988); *Summers v. State*, 298 Ark. 605, 771 S.W.2d 16 (1989); *Cherry v. State*, 301 Ark. 86, 780 S.W.2d 574 (1989); *Hooper v. State*, 307 Ark. 378, 820 S.W.2d 276 (1991).

An error in filing untimely notice of appeal, admittedly made by the attorney for a criminal defendant, is good cause to grant a motion for rule on the clerk. *Taylor v. State*, 297 Ark. 281, 760 S.W.2d 382 (1988).

Where the attorney does not admit fault on his part for not timely filing transcript, good cause for granting motion for rule on the clerk is not shown. *West v. State*, 297 Ark. 392, 763 S.W.2d 69 (1988).

Mistake of Counsel.

Where attorney in a criminal proceeding admitted that the record was tendered late due to a mistake on his part, such error is good cause to grant the motion. *Harris v.*

State, 304 Ark. 111, 798 S.W.2d 926 (1990); Lewis v. State, 304 Ark. 311, 800 S.W.2d 722 (1991); York v. State, 305 Ark. 537, 808 S.W.2d 778 (1991); Vaughan v. State, 305 Ark. 555, 810 S.W.2d 327 (1991); Wicoff v. State, 306 Ark. 401, 814 S.W.2d 267 (1991).

The fact that an attorney had "current commitments" was not relevant to whether a record was ordered and whether the court reporter could timely transcribe that record. *Jacobs v. State*, 321 Ark. 561, 906 S.W.2d 670 (1995).

When defendant's attorney admitted that he miscalculated the time for filing the record on appeal, such error was cause for granting defendant's motion for rule on the clerk. *Dwills v. State*, 347 Ark. 294, 62 S.W.3d 359 (2001).

Appellate court ordered its clerk to accept a late record in a criminal appeal even though defendant had not obtained an order authorizing an extension of time in which to file the record where the order was signed only one day after the record was due in the appellate court and defendant's counsel accepted full responsibility for not having the extension order signed in a timely manner. *Carter v. State*, 350 Ark. 191, 85 S.W.3d 552 (2002).

Remand was necessary for the trial court to determine whether fault on the part of defendant's trial attorney caused defendant's failure to file the complete record in his pro se appeal by the 90-day deadline; even after counsel learned of the pro se appeal, she apparently failed to seek an extension while it could still be granted by the trial court. *Moore v. State*, 359 Ark. 370, 197 S.W.3d 447 (2004).

Where the public defender filed a motion to withdraw as counsel, she stated that defendant's notice of appeal was timely filed; however, the public defender left the date of the transcript's filing blank in her motion. Defendant's motion for rule on clerk was remanded due to noncompliance with subsection (b) of this rule. *Motes v. State*, 368 Ark. 600, 247 S.W.3d 814 (2007).

Defendant's attorney stated in the motion for rule on the court that, due to a mistake in his part, the order granting a motion for an extension of time to file the record failed to comply with the requirements of this rule. Because the attorney candidly admitted fault, the motion was granted. *Drake v. State*, 372 Ark. 177, 271 S.W.3d 525 (2008).

Supreme court granted defendant's motion for rule on the clerk because, while defendant did not strictly comply with subdivision (b)(1)(C) of this rule when he sought an extension of time in the circuit court, the record showed that his attorney was at fault, and defendant was not due to be penalized for his attorney's failure to timely perfect his appeal. The clerk was directed to accept the record

and docket the appeal. *Bond v. State*, 373 Ark. 257, 283 S.W.3d 186 (2008).

Notice to Opposing Counsel.

Although subsection (b) of this rule states no specific time requirement as to notice that counsel seeking an extension of time to file the record on appeal must give to opposing counsel, the history of the notice requirements on petitions for extension as set forth in *Gallman v. Carnes*, 254 Ark. 155, 492 S.W.2d 255 (1973) and the court's pronouncements in that case make it clear that the only requirement is for "reasonable notice" within the discretion of the trial court. *Osborn v. Wilson*, 11 Ark. App. 226, 669 S.W.2d 481 (1984).

Denial of the motion to extend for failure to serve copy of notice of appeal on opposing counsel was abuse of discretion. *Henderson Methodist Church v. Sewer Imp. Dist. No. 142*, 294 Ark. 188, 741 S.W.2d 272 (1987).

Because motion for extension did not indicate notice was given to opposing counsel as required by subsection (b) of this rule, extension was improperly granted. *West v. State*, 322 Ark. 114, 907 S.W.2d 133 (1995).

Where appellants filed a motion for rule on the clerk, it was necessary to remand the matter to the trial court for compliance with subdivision (b)(1)(c) of this rule because there was no finding by the trial court in the order granting an extension that all parties had the opportunity to be heard on the motion, either at a hearing or by responding in writing. *Woods v. Tapper*, 367 Ark. 239, 238 S.W.3d 929 (2006).

Where the trial judge extended the deadline for filing an appeal, it was necessary to remand the matter back to the trial judge for strict compliance with this rule as there was nothing in the order to indicate that all parties had an opportunity to be heard on the motion, either at a hearing or by responding in writing. *Jones v. State*, 367 Ark. 324, 239 S.W.3d 483 (2006).

Partial Record.

If the time for appeal has expired and the prevailing party prefers to formalize that fact without waiting for seven months to elapse, such party may file with the clerk a partial record and move for a dismissal. Where the partial record demonstrates that the appeal is barred, that motion will be granted. *Mitchell v. City of Mt. View*, 304 Ark. 585, 803 S.W.2d 556 (1991).

When an appellant seeks an extension of time beyond the seven months to file his or her record, his or her remedy is to file a partial record in the supreme court and seek an extension for a compelling reason, such as an avoidable casualty. In *re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992).

When a complete record is not available by

the end of the seven-month limit, a partial record will suffice. *Franklin v. State*, 318 Ark. 687, 886 S.W.2d 633 (1994).

Power to Dismiss Appeals.

While the trial court has the authority to extend the time for docketing the record with the Supreme Court or with the Court of Appeals, the rules of appellate procedure do not confer on the trial court the power to dismiss appeals. *Johnson v. Carpenter*, 290 Ark. 255, 718 S.W.2d 434 (1986).

Remand.

Where a trial court's order of extension made no reference to each of the findings of the trial court required by subsection (b) of this rule, and because there had to be strict compliance with the rule, the reviewing court remanded the matter to the trial court for compliance with subsection (b). *Charles R. Griffith Farms, Inc. v. Grauman*, 373 Ark. 410, 284 S.W.3d 68 (2008).

Reporter's Transcript.

Failure by the court reporter to transcribe the proceedings of a two-day trial within the time prescribed by the rules is inexcusable. *Franklin v. State*, 318 Ark. 687, 886 S.W.2d 633 (1994).

Responsibility for Costs.

Appellate court denied a motion to dismiss mother's appeal for failure to file a record because an appeal from a termination of parental rights could not be conditioned on her ability to pay for the preparation of a record. *Bogachoff v. Ark. Dep't of Human Servs.*, 360 Ark. 259, 200 S.W.3d 884 (2005).

Responsibility for Filing Record.

The attorney is responsible for filing the record and cannot shift that responsibility to the trial judge, or to the court reporter, or to the clerk of the lower court. *Lewis v. State*, 295 Ark. 165, 747 S.W.2d 91 (1988); *Rayford v. State*, 324 Ark. 349, 920 S.W.2d 839 (1996).

It is an attorney's duty to timely file the record. *Parrish v. State*, 313 Ark. 313, 853 S.W.2d 284 (1993); *O'Neal v. State*, 320 Ark. 94, 896 S.W.2d 592 (1995).

Because defendant's attorney failed to accept responsibility for not filing the record within the required time, defendant's motion for rule on the clerk was denied: the attorney had to file within 30 days from the date of the order a motion and affidavit accepting full responsibility for not timely filing the record. *Welch v. State*, 353 Ark. 654, 111 S.W.3d 378 (2003), criticized *McDonald v. State*, 146 S.W.3d 883 (2004).

Supreme Court of Arkansas granted a client's motion for rule on clerk where the court was unable to determine whether subdivision (b)(1) of this rule was complied with when the original motion for extension of time was

granted, and the court concluded that there was error by the client's attorney in that the record was not timely filed. *Griddine v. State*, 373 Ark. 511, 284 S.W.3d 523 (2008).

Time for Filing Record.

Where decree was entered on May 8, 1980, and the notice of appeal was filed on May 30, after which the trial judge signed an order extending the time for filing the record on appeal to October 15, but did not sign a further extension of time until October 22, a week after the first extension had expired, due, according to the judge's statement, to an oversight, the record was tendered too late under this rule, to be docketed for appeal, since the responsibility for the timely filing of appeals must rest upon the litigant and his attorney rather than upon the trial judge or court reporter. *Christopher v. Jones*, 271 Ark. 911, 611 S.W.2d 521 (1981).

The record on appeal from the Workers' Compensation Commission should be filed in the Court of Appeals within 90 days from the filing of the notice of appeal as is required in other civil actions. *Davis v. C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981).

This rule provides a simple and readily understandable procedure, by which the trial court cannot extend the time for filing the record beyond seven months after the entry of the judgment. *Yent v. State*, 279 Ark. 268, 650 S.W.2d 577 (1983), criticized *Pentron Corp. v. Delta Steel & Constr. Co.*, 689 S.W.2d 539 (1985). But see *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985).

Subsection (b) of this rule, which provides that a judge may permit papers or pleadings to be filed with him, and that in such event he should note thereon the filing date and forthwith transmit them to the office of the clerk, does not mean an order can be deemed "entered" simply because it is signed by a judge; thus, where the trial judge signed an order granting an extension for filing the record on appeal on the 89th day, but the extension order was not entered and filed with the clerk's office until the 91st day, the extension order was not timely filed and the clerk properly denied the tender of the transcript. *Sullivan v. Wickliffe*, 284 Ark. 33, 678 S.W.2d 771 (1984).

The seven-month time limitation for filing a record on appeal runs from the date of the notice of appeal and not from the date of entry of judgment. *Pentron Corp. v. Delta Steel & Constr. Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985), criticized *In re Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992).

Even though the petitioner relied on a judge's order extending the time for filing the record on appeal more than seven months from the date of the entry of the judgment, the petitioner could not file the record on appeal

eight months after the date of the entry of the judgment. *Perry v. State*, 287 Ark. 384, 699 S.W.2d 739 (1985).

When both parties file notices of appeal or when one party files notices of appeal from different orders, the 90-day period under subsection (a) of this rule begins to run from the filing of the first notice of appeal. *Street v. Kurzinski*, 290 Ark. 155, 717 S.W.2d 798 (1986).

A trial court cannot extend the time for the filing of the record to a date more than seven months from the date of the entry of the judgment, except in event of a postjudgment motion under Rule 4(b), and in that case it is seven months "from the date on which a timely post judgment motion under Rule 4(b) is deemed to have been disposed of." In re *Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992).

Where in the case of *Pentron Corp. v. Delta Steel & Construction Co.*, 286 Ark. 91, 689 S.W.2d 539 (1985), the Supreme Court stated that after a posttrial motion, the appellant has seven months "from the notice of appeal" to file the record in the clerk's office, the opinion should have stated that the appellant has seven months "from the date on which a timely postjudgment motion under Rule 4(b) is deemed to have been disposed of under Rule 4(c)." In re *Estate of Wilkinson*, 311 Ark. 311, 843 S.W.2d 316 (1992).

Where the postjudgment motion regarding an original October decree was deemed denied in November, pursuant to RAP-Civ 4(c), the seven-month period from that date expired in June, and a record not tendered until July was not timely with respect to the October decree, but was timely filed with respect to a December supplemental decree. *Sunland Enters., Inc. v. Andrews*, 314 Ark. 229, 861 S.W.2d 311 (1993).

Where appellants obtained a timely order permitting them to file their record on Monday, January 2, 1995, which turned out to be a legal holiday, the filing deadline was extended by rule to the next business day — in this instance, Tuesday, January 3, 1995. *Watanabe v. Webb*, 320 Ark. 375, 896 S.W.2d 597 (1995), appeal dismissed 321 Ark. 569, 905 S.W.2d 70 (1995).

Document with date and time affixed by the Court Clerk's facsimile machine, but not separately file-stamped by the Clerk, held timely, despite the literal interpretation of this rule and RAP-Civ 4 requiring otherwise. *Bhatti v. McCabe*, 326 Ark. 176, 928 S.W.2d 340 (1996).

In the interest of public policy, de facto judge had the authority to enter the order extending the time to lodge the record on appeal, and appellee's motion to dismiss was denied. *Farm Bureau Policyholders v. Farm Bureau Mut. Ins. Co.*, 330 Ark. 350, 952 S.W.2d 675 (1997).

The 90-day period allowed by subsection (a) of this rule for filing the record on appeal regarding defendant's conviction of a misdemeanor offense began to run on the effective date of defendant's original notice of appeal, which was the date following the trial court's denial of defendant's posttrial motion, and not the date on which defendant filed a second notice of appeal, which served only to amend the first notice by including the denial of the motion as one of the issues being appealed; thus, defendant's counsel was given 30 days to accept full responsibility for the late filing or defendant's motion for a rule on the clerk to allow a late filing of the record would be denied. *Smith v. State*, 351 Ark. 325, 97 S.W.3d 380 (2002).

Arguments offered by the nursing home, that the reason for the extension of the appeal was obvious and that the estate administrator suffered no prejudice, did not justify dispensing with the clear requirements of subsection (b) of this rule; the nursing home failed to strictly comply with the requirements for obtaining an extension of the time to lodge the record on appeal. *Rose Care, Inc. v. Jones*, 355 Ark. 682, 144 S.W.3d 738 (2004).

Attorney who had been disciplined timely filed a notice of appeal, but failed to file the record on appeal in a timely fashion; thus, her request for a rule on the clerk to file a belated appeal was denied. *Mosby v. Office of Prof'l Conduct*, 356 Ark. 500, 156 S.W.3d 253 (2004).

Timely filing of the record on appeal is a jurisdictional requirement; thus, where a mother filed a partial record in her appeal of the termination of her parental rights after an initial extension of time to file the record had expired, the jurisdictional requirement was not met and the appeal was dismissed. *Hickson v. Ark. Dep't of Human Servs.*, 357 Ark. 577, 182 S.W.3d 483 (2004).

Where counsel representing mother on review of two orders terminating her parental rights tendered a five-volume record of the circuit court proceedings, the clerk properly rejected the record because it was tendered outside of the 90-day time limit with respect to the circuit court's second termination order. *Suggs-Rendon v. Ark. Dep't of Human Servs.*, 359 Ark. 204, 195 S.W.3d 888 (2004).

Requiring a record to be filed within 90 days of the first notice of appeal from a final judgment eliminates any possibility of confusion for the parties and does not impose an additional burden on a cross-appellant; a cross-appellant would not be called upon to determine whether appellant's first notice of appeal was a nullity and then decide whether to file a record but, rather, counsel for cross-appellant could simply monitor the docket and, upon discovering that appellant was nearing the deadline and had failed to file a record, move the circuit court to extend the

time in which to file the record so that a record could be filed on his or her behalf. *Larry v. Grady Sch. Dist.*, 362 Ark. 65, 207 S.W.3d 451 (2005).

Denial of employer's motion for rule on the clerk to accept an untimely record was affirmed as this rule required the records to be filed within 90 days of the notice of appeal being filed, and the employer tendered the record outside of the ninety-day time period. *Waste Mgmt. v. Estridge*, 363 Ark. 42, 210 S.W.3d 869 (2005).

Workers' Compensation Commission's alleged failure to follow either the proper statutory procedures or its own internal policies in notifying an employer as to the completion of a transcript did not constitute extraordinary circumstances justifying a late-filed record where the employer's counsel failed to either call the Commission to inquire about the status of the record or file a petition for writ of certiorari to order the Commission to complete and file the record. *Waste Mgmt. v. Estridge*, 363 Ark. 42, 210 S.W.3d 869 (2005).

Granting an extension of time for filing the record filed by husband was improper because the 90-day period had expired before the circuit court held the hearing on husband's motion and before the record was filed with the Arkansas Supreme Court. *Conlee v. Conlee*, 366 Ark. 342, 235 S.W.3d 515 (2006).

Appellee's Ark. R. Civ. P. 59 motion was treated as filed on December 19, 2007, which was not timely filed; therefore, under subsection (a) of this rule, the record was due to be filed on or before March 11, 2008, ninety days from the company's filing of the notice of appeal; because it was not, the company's motion for rule on clerk was denied. *DFH/PJH Enters., LLC v. Caldwell*, 373 Ark. 412, 284 S.W.3d 66 (2008).

Employer's attempt to lodge a record with clerk of the court was untimely under subdivision (b)(2) of this rule as it was more than 7 months after date upon which a timely postjudgment motion was disposed. A subsequent order on attorney's fees was a collateral matter, which did not extend the time to file a notice of appeal under Ark. R. App. P. Civ. 4(b)(1). *Midwest Terminals of Toledo, Inc. v. Palm*, 2011 Ark. 81, — S.W.3d —, 2011 Ark. LEXIS 76 (Feb. 24, 2011).

Cited: *City of Fort Smith v. Moore*, 269 Ark.

617, 599 S.W.2d 750 (1980); *Akins v. Williams*, 548 F. Supp. 138 (E.D. Ark. 1982); *Smith v. State*, 275 Ark. 416, 630 S.W.2d 22 (1982); *Appleton-Rice v. Crumpler*, 279 Ark. 450, 655 S.W.2d 1 (1983); *Virgin v. State*, 283 Ark. 382, 677 S.W.2d 840 (1984); *Ward v. State*, 290 Ark. 185, 717 S.W.2d 492 (1986); *Perry v. Chief of Police*, 660 F. Supp. 1546 (E.D. Ark. 1987); *Duncan v. State*, 291 Ark. 314, 724 S.W.2d 179 (1987); *Venhaus v. Pulaski County Quorum Court*, 292 Ark. 296, 729 S.W.2d 13 (1987); *Duncan v. State*, 292 Ark. 662, 731 S.W.2d 784 (1987); *Sanders v. State*, 294 Ark. 207, 740 S.W.2d 928 (1987); *McKimm v. State*, 294 Ark. 208, 742 S.W.2d 114 (1988); *Poole v. Poole*, 298 Ark. 550, 768 S.W.2d 544 (1989); *Crutcher v. State*, 300 Ark. 29, 775 S.W.2d 896 (1989); *Winberry v. State*, 300 Ark. 32, 775 S.W.2d 896 (1989); *Brown v. State*, 300 Ark. 201, 777 S.W.2d 585 (1989); *Jeffers v. State*, 300 Ark. 425, 778 S.W.2d 953 (1989); *Sullivan v. State*, 301 Ark. 352, 784 S.W.2d 155 (1990); *Smith v. State*, 302 Ark. 169, 788 S.W.2d 948 (1990); *Watson v. State*, 303 Ark. 240, 795 S.W.2d 355 (1990); *Nichols v. State*, 303 Ark. 328, 796 S.W.2d 346 (1990); *Santana v. State*, 303 Ark. 329, 795 S.W.2d 361 (1990); *Williams v. Luft Constr. Co.*, 31 Ark. App. 198, 790 S.W.2d 921 (1990); *Atkins v. State*, 308 Ark. 675, 827 S.W.2d 636 (1992); *Leonard v. Leonard's Hdwe., Inc.*, 309 Ark. 450, 828 S.W.2d 846, appeal dismissed 840 S.W.2d 167 (1992); *Rockett v. State*, 317 Ark. 430, 877 S.W.2d 593 (1994), criticized *McDonald v. State*, 146 S.W.3d 883 (2004); *McCraw v. McCraw*, 46 Ark. App. 236, 878 S.W.2d 3 (1994); *Patton v. State*, 320 Ark. 271, 895 S.W.2d 531 (1995); *Patton v. State*, 320 Ark. 513, 898 S.W.2d 446 (1995); *Mayo v. State*, 321 Ark. 566, 906 S.W.2d 285 (1995); *Cook v. State*, 327 Ark. 125, 937 S.W.2d 641 (1997); *Dougan v. State*, 327 Ark. 671, 940 S.W.2d 478 (1997); *McClane v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998); *Jones v. Abraham*, 341 Ark. 66, 15 S.W.3d 310 (2000); *Ortho-Neuro Med. Assocs. v. Jeffrey*, 344 Ark. 72, 37 S.W.3d 577 (2001); *Smith v. State*, 363 Ark. 576, 215 S.W.3d 588 (2005); *Roy v. State*, 367 Ark. 178, 238 S.W.3d 117 (2006); *Terry v. State*, 367 Ark. 236, 238 S.W.3d 922 (2006); *Smith v. State*, 372 Ark. 217, 272 S.W.3d 105 (2008); *Wilhelms v. Sexton*, 102 Ark. App. 46, 280 S.W.3d 565 (2008).

Rule 6. Record on appeal.

(a) *Composition of record.* The record shall be compiled in accordance with the rules of the Arkansas Supreme Court and Court of Appeals.

(b) *Transcript of proceedings.* On or before filing the notice of appeal, the appellant shall order from the reporter a transcript of such parts of the proceedings as he has designated in the notice of appeal and make any financial arrangements required by the court reporter pursuant to Ark.

Code Ann. § 16-13-510(c). If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or contrary thereto, he shall include in the record a transcript of all evidence relevant to such finding or conclusion. If the appellant has designated less than the entire record or proceedings, the appellee, if he deems a transcript of other parts of the proceedings to be necessary, shall, within ten (10) days after the receipt of the notice of appeal, file and serve upon the appellant (and upon the court reporter if additional testimony is designated) a designation of the additional parts to be included. The appellant shall then direct the reporter to include in the transcript all testimony designated by appellee.

(c) *Record to be abbreviated.* All matters not essential to the decision of the questions presented by the appeal shall be omitted. Formal parts of all exhibits and more than one copy of any document shall be excluded. Documents shall be abridged by omitting all irrelevant and formal portions thereof. For any infraction of this rule or for the unnecessary substitution by one party of evidence in question and answer form for a fair narrative statement proposed by another, the appellate court may withhold or impose costs as the circumstances of the case and discouragement of like conduct in the future may require; and costs may be imposed upon offending attorneys or parties. Where parties in good faith abbreviate the record by agreement or without objection from opposing parties, the appellate court shall not affirm or dismiss the appeal on account of any deficiency in the record without notice to appellant and reasonable opportunity to supply the deficiency. Where the record has been abbreviated by agreement or without objection from opposing parties, no presumption shall be indulged that the findings of the circuit court are supported by any matter omitted from the record.

(d) *Statement of the evidence or proceedings when no report was made or the transcript is unavailable.* If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best means available, including his recollection. The statement shall be served on the appellee, who may serve objections or proposed amendments thereto within ten (10) days after service upon him. Thereupon the statement and any objections or proposed amendments shall be submitted to the circuit court for settlement and approval and as settled and approved shall be included in the record on appeal by the clerk of the circuit court that entered the judgment, decree, or order from which the appeal is taken.

(e) *Correction or modification of the record.* If any difference arises as to whether the record truly discloses what occurred in the circuit court, the difference shall be submitted by motion to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the circuit court before the record is transmitted to the appellate court, or the appellate court on motion, or on its own initiative, may direct that the omission or misstatement shall be corrected, and if necessary, that a supplemental record be certified and transmitted. All other questions as to form and content of the record shall be presented to the appellate court. No correction or modification of the record shall be made without prior notice to all parties.

(f) *Access to parts of record under seal.* When the record contains materials under seal, all counsel of record and pro se litigants shall have

access to all parts of the record including the material under seal. For good cause shown on the motion of any party, the appellate court may modify the terms of access. (Adopted and amended July 10, 1995, effective January 1, 1996; amended June 7, 2001, effective July 1, 2001; amended February 10, 2005; amended October 23, 2008, effective January 1, 2009; amended September 24, 2009.)

Explanatory Note: The new redaction requirements for confidential information will create some materials under seal in many cases. This new subdivision makes clear that counsel and unrepresented litigants need not file a motion for access to such materials in every case; access by counsel and pro se litigants is presumptively allowed. This arrangement may be modified on motion for good cause.

This minor amendment harmonizes part of this Rule with part of Rule of Appellate Procedure — Civil 4(a). Under the latter rule, a party has at least ten days after receiving a notice of appeal to file a notice of cross appeal. The deadline for taking that step should be the same as the deadline for designating additional record materials under Rule of Appellate Procedure — Civil 6(b). The change makes Rule 6 track Rule 4: the ten-day window for filing either a cross appeal or a designation of additional record materials opens when a party receives a notice of appeal and closes ten days later.

Reporter's Notes to Rule 6 (1995): This rule tracks former Appellate Rule 6 without change. The Reporter's Notes prepared in connection with former Appellate Rule 6 are set out below.

Reporter's Notes (as modified by the Court) to Rule 6: 1. Rule 6 combines and condenses a number of superseded Arkansas statutes, but makes no drastic changes in prior practice and procedure. Section (a) recognizes that the Arkansas Supreme Court has adopted extensive rules governing the contents and order of the record and defers such matter to the Supreme Court rules. *Ark. Stat. Ann.* 27-2137.8 (Repl. 1962) is superseded in part by Section (a) of this rule.

2. Section (b) represents a combination of Rule 10(b) of the Federal Rules of Appellate Procedure and superseded *Ark. Stat. Ann.* 27-2127.3 (Repl. 1962). It requires the appellant to order the transcript at or before the filing of the notice of appeal (which under Rule 3 must contain a statement that such action has been taken). It also gives the appellee the right to require appellant to complete the transcript by filing a designation within ten days after the filing of the notice of appeal. This is in accord with superseded *Ark. Stat. Ann.* 27-2127.2 (Repl. 1962). As noted in Rule 3 hereof, appellant's notice of appeal must also contain a designation of the record;

therefore appellee's designation must be filed within ten days after the notice of appeal is filed. Section (b) makes no provision for adjustment of costs where the record is supplemented at the request of appellee. Normally, appellant bears the initial expense and the Arkansas Supreme Court can thereafter make the proper adjustment of costs upon request of one of the parties.

3. Section (c) is copied from superseded *Ark. Stat. Ann.* 27-2127.6 (Repl. 1962).

4. Section (d) is lifted from Rule 10(c) of the Federal Rules of Appellate Procedure and is substantially the same as superseded *Ark. Stat. Ann.* 27-2127.11 (Repl. 1962). This section expressly provides that it applies not only where no record is made, but also where the record is unavailable. The superseded Arkansas statute did not contain this express language, although it was so construed. *Ark. State Hwy. Comm'n v. Clay*, 241 Ark. 501, 408 S.W.2d 600 (1966).

5. Section (e) tracks superseded *Ark. Stat. Ann.* 27-2129.1 (Repl. 1962) and Rule 10(e) of the Federal Rules. It works no changes in Arkansas practice or procedure.

Addition to Reporter's Notes, 1997 Amendment: The first sentence of subdivision (b) is amended to require that the appellant not only order the transcript on or before filing the notice of appeal, but also make any financial requirements required by the court reporter for its preparation. Under *Ark. Code Ann.* § 16-13-510(c), the court reporter's duty to transcribe and certify the record "may be conditioned upon the payment, when requested by the court reporter, of up to fifty percent (50%) of the estimated cost of the transcript." The amendment makes Rule 6(b) consistent with Rule 3(e), which was previously amended to require that the notice of appeal state that the appellant had made the necessary financial arrangements.

Addition to Reporter's Notes, 2001 Amendment: The references to "trial court" in subdivisions (c), (d), and (e) have been replaced with "circuit court" in light of Constitutional Amendment 80, which established the circuit courts as the "trial courts of original jurisdiction" in the state. Subdivision (d) has been further revised by specifying that certification of the record shall be made by the clerk of "the circuit court that entered the judgment, decree, or order from which the appeal is taken." In most cases, the circuit

clerk serves as clerk of the circuit court. However, in some counties the county clerk handles probate matters. This division of labor is discussed in the 2001 Reporter's Note accompanying Rule 3 of the Rules of Civil Procedure.

Addition to Reporter's Notes, 2005

Amendment: Rule 6(e) has been amended in three ways: it changes Arkansas law about which court — circuit or appellate — has jurisdiction to correct or modify the record in a case on appeal; it requires notice to all parties before any court alters the record; and it clarifies that the parties should proceed by motion when seeking to alter the record.

Amended Rule 6(e) preserves jurisdiction in the circuit court to correct or modify the record after a party files a notice of appeal and before the party files the record with the clerk of the Supreme Court and Court of Appeals. The 2005 amendment eliminates the circuit court's jurisdiction to alter the record after it has been filed. From that point forward, the appellate court has jurisdiction to correct or modify the record or remand to the circuit court for it to consider doing so.

This amendment overrules in part both the Supreme Court's recent decision in *Gore v. Heartland Community Bank*, No. 03-791, 2004 WL 743802 (8 April 2004), and *Davie v. Smoot*, 202 Ark. 294, 150 S.W.2d 50 (1941). Applying former Rule 6, *Gore* allowed a cir-

cuit court to modify the record while the case was pending in the Supreme Court. *Davie* is a pre-Rules case, which holds that trial courts have continuing jurisdiction to correct records even while a case is on appeal. As noted by the concurring opinion in *Gore*, the former version of Rule 6 confused parties and created an untenable situation: simultaneous jurisdiction in the appellate court and the circuit court to alter the record on appeal. The better practice is to have a bright jurisdictional line, which the amended Rule provides. Moreover, amended Rule 6 preserves the appellate courts' often-used authority to remand the case to the circuit court to settle the record.

The last sentence of the amended Rule is new. As both opinions in *Gore* pointed out, the former version of Rule 6(e) contained no requirement of notice to the parties before any court modified the record. The better practice is for all parties to have the opportunity to be heard on proposed changes. The amended Rule requires notice of all proposed changes to the record.

Finally, amended Rule 6(e) clarifies that parties should seek modifications and corrections of the record by motion. That requirement will help provide notice and achieve the Rule's purpose: to make the record on appeal accurately reflect what happened in the circuit court.

CASE NOTES

ANALYSIS

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Construction.

Subsection (d) of this rule provides a procedure which a party may use when no report of a proceeding has been made. *Trans Union Corp. v. Crisp*, 49 Ark. App. 76, 896 S.W.2d 446 (1995).

Burden on Appellant.

Where appellant was denied a jury instruction, her failure to proffer or abstract the desired instruction as part of her appeal was

fatal to her appellate argument. *Kelley v. Medlin*, 309 Ark. 146, 827 S.W.2d 655 (1992).

When there is no attempt to make a record in compliance with subsection (d) of this rule, it is presumed that the matters presented in the unrecorded hearing support the trial court's findings. *Argo v. Buck*, 59 Ark. App. 182, 954 S.W.2d 949 (1997).

Where the heirs did not file a sufficient record to place their issues on appeal before the appellate court, the appellate court could not decide the issues on appellate review and the trial court's judgment was affirmed. *Seay v. Quinn (In re Estate of Seay)*, 352 Ark. 113, 98 S.W.3d 821 (2003).

In his appellate brief, a party made no convincing argument that the trial court erred in granting summary judgment, and thus the party did not meet his burden on appeal of demonstrating reversible error. *Aon Risk Servs. v. Meadors*, 100 Ark. App. 272, 267 S.W.3d 603 (2007).

Consent to Record.

Individual failed to object to the abbreviated record and did not file a designation of any additional materials he believed should have been included in the record, such that he tacitly consented to the record. *Chiodini v.*

Lock, 2009 Ark. 343, 322 S.W.3d 9 (2009).

Correction or Modification.

Ordinarily, the appellate court will leave it to the parties to move that the record on appeal be supplemented under subsection (e) of this rule; however, where it was a capital felony murder case in which the death penalty was imposed, the court issued a writ of certiorari to the trial court to include a statement which the appellant claimed was exculpatory. *Snell v. State*, 290 Ark. 503, 721 S.W.2d 628 (1986), cert. denied 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987).

Counsel was ordered to correct all pages of the record that contained highlights or notations by preparing a supplemental record, properly certified, to replace the corrected pages, and to file the corrections within 30 days. *Jones v. Little Rock Family Planning Servs.*, 58 Ark. App. 250, 949 S.W.2d 568 (1997).

Attorneys of record were directed to review the record to determine what portions, if any, had been omitted and to certify to the clerk, by affidavit, that the record was true, accurate, and complete; upon such certification, the appellate court would accept the record, and if either or both attorneys decline to certify that the record was complete within 30 days of the per curiam order, then the matter would be remanded to the trial court to settle the record, pursuant to subsections (d) and (e) of this rule. *Hamilton v. Jones*, 355 Ark. 257, 132 S.W.3d 724 (2003).

While trial court lost jurisdiction to act further in a matter once the record was lodged in the appellate courts, the trial court had continuing jurisdiction under subsection (e) of this rule to correct court orders to make them speak the truth; the appellate court could direct that the record be corrected and, if necessary, that a supplemental record be certified and transmitted, such that the trial court clearly had jurisdiction to supplement the record. *Gore v. Heartland Cmty. Bank*, 356 Ark. 665, 158 S.W.3d 123 (2004).

Although a suspended sentence for escape had probably expired prior to the date of a revocation hearing, defendant was not entitled to relief because a motion to supplement the record to add the date of release was denied; the evidence was never presented to the trial court prior to the entry of judgment. *Rameriz v. State*, 91 Ark. App. 271, 209 S.W.3d 457 (2005).

Legal description of a parcel was not merely ministerial, supplemental, or collateral such that it might have been allowed pursuant to subsection (e) of this rule where the subject matter of the case was the ownership of the parcel. *Myers v. Yingling*, 369 Ark. 87, 251 S.W.3d 287 (2007).

Costs.

Where the appellee did not notify the appellant that it deemed a transcript of other parts of the proceedings to be necessary, but instead, ordered a transcript of all other proceedings and asked reimbursement for those costs, costs would be awarded for those pages of the transcript supplied by the appellee which were necessary for the decision of the appeal, and denied for the remainder of the transcript, which concerned matters which were not on appeal, and could not have been thought by appellee to be on appeal after reading the designated points of appeal. *Ragland v. Commercial Nat'l Bank*, 276 Ark. 418, 635 S.W.2d 258 (1982).

In the absence of a court order to the contrary, an appellant must file in the appellate court the record designated by both parties or suffer the appeal to be dismissed for failure to file a designated record, and appellant cannot, on his own determination, cast on appellee the burden of paying for the additional record designated. *Baker v. Baker*, 43 Ark. App. 56, 858 S.W.2d 157 (1993).

Plaintiffs' motion to retax costs would be denied where defendants were not unreasonable in their belief that additional portions of the record were needed for consideration of the issues initially raised by the plaintiffs but ultimately not argued. *National Bank of Commerce v. Quirk*, 323 Ark. 769, 918 S.W.2d 138 (1996), amended, 325 Ark. 31, 922 S.W.2d 717 (1996), overruled in part on other grounds, *Ark. HHS v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006).

Under Ark. R. App. P. Civ. 3(e) and this rule, if the store, as cross-appellant, wanted portions of the record brought up on appeal in addition to those provided for by appellant because such portions were necessary for its cross-appeal, it was incumbent on the store to designate such portions and to make financial arrangements to obtain the records. It was not appellant's burden to anticipate the store's argument on cross-appeal and to prepare, at her expense, the record wanted by the store. *Darrough v. Tobacco Superstore, Inc.*, 374 Ark. 63, 285 S.W.3d 626 (2008).

Dismissal of the hunter's appeal after the Arkansas Game and Fish Commission and its director canceled hunting season after it had already been approved was appropriate because the notice of appeal did not substantially comply with Ark. R. App. P. Civ. 3(e). There could be no compliance with R. 3(e) when the notice of appeal declared that the necessary financial arrangements had been made when, in reality, they had not been under subsection (b) of this rule; the hunter's counsel failed to make the necessary financial arrangements with the court reporter as represented in his notice of appeal until more than two months later after he had filed a

motion for extension of time, Ark. R. App. P. Civ. 5(b)(1)(D). *Clark v. Ark. Game & Fish Comm'n*, 2011 Ark. 279, — S.W.3d —, 2011 Ark. LEXIS 250 (June 23, 2011).

Failure to Make Record.

Where no attempt was made to make a record in compliance with this rule, it is presumed that the matters presented in the hearing support the trial court's findings. *Wagh v. Wagh*, 7 Ark. App. 122, 644 S.W.2d 630 (1983); *Rush v. Wallace*, 23 Ark. App. 61, 742 S.W.2d 952 (1988).

Appellate court overruled appellant's assertion that the circuit court's failure to make a record was grounds to set aside its order and that the case should be remanded so that a hearing could be held and a record made, because appellant did not attempt to reconstruct a record under subsection (d) of this rule, thus, she could not demonstrate error by the trial court concerning its failure to make a record. *Turner v. Brandt*, 100 Ark. App. 350, 268 S.W.3d 924 (2007).

Hearing.

Subsection (e) of this rule does not expressly require that a hearing be held in order to settle the record. *Craig v. State*, 64 Ark. App. 281, 983 S.W.2d 440 (1998).

Incomplete Record.

The lack of a complete record on the matter as to which error is alleged is no impediment to appeal. *Zimmerman v. Ashcraft*, 268 Ark. 835, 597 S.W.2d 99 (1980).

Where there is virtually no record of the proceedings conducted out of the presence of the jury due to a malfunction of a recording device and the record is inadequate for appellate review, the Supreme Court can do nothing other than remand the case for a new trial. *Holiday Inns, Inc. v. Drew*, 276 Ark. 390, 635 S.W.2d 252 (1982).

A new trial is not required simply because the record cannot be prepared; this rule contemplates that when a transcript is unavailable, the appellant may prepare a statement of the evidence from the best means available. *Dorazio v. Davis*, 283 Ark. 65, 671 S.W.2d 173 (1984).

Where the trial was recorded by an uncertified court reporter, appointed by the trial judge to fill in for the certified court reporter who was ill, the trial judge was to direct and supervise the preparation of the trial transcript made from the recording made by the uncertified court reporter, if verified by affidavits from attorneys for both parties and the trial judge. *Moore v. State*, 290 Ark. 71, 716 S.W.2d 764 (1986).

Where the defendant claimed that information was withheld in violation of subsection (d) of ARCrP 17.1 which tended to negate his guilt, and the trial judge pronounced the statement free of exculpatory information,

the record on appeal was supplemented to include the information. *Snell v. State*, 290 Ark. 184, 717 S.W.2d 818 (1986), cert. denied, 484 U.S. 872, 108 S. Ct. 202, 98 L. Ed. 2d 153 (1987), 490 U.S. 1075, 109 S. Ct. 2090, 104 L. Ed. 2d 653 (1989).

A capital murder case involving imposition of a life sentence without the possibility of parole was remanded where the court was precluded from a full review of what transpired at trial due to an incomplete record. *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997).

Supreme court was precluded from considering a decedent's family's appeal where the record was incomplete because (1) the trial court's second order that vacated the original summary-judgment order was not in the record, (2) without the second order, it was impossible for the supreme court to determine whether the trial court properly vacated the original order, and (3) without the second order, the family's appeal, which was filed more than one year after the original order was filed, was clearly untimely. *Barnett v. Monumental Gen. Ins. Co.*, 354 Ark. 692, 128 S.W.3d 803 (2003).

On review of the circuit court's temporary award of custody, where there was no transcript from the hearing as required by subsections (c) and (e) of this rule, appellant was ordered to supply the court with a certified, supplemental record that included a transcript of the hearing. *Gilbert v. Moore*, 362 Ark. 657, 210 S.W.3d 125 (2005).

On review of an order granting summary judgment, the brief-in-support of the motion, the response brief, and the arguments of counsel made during the summary judgment hearing were missing from the appellate record; thus, pursuant to subsections (c) and (e) of this rule, appellants were ordered to supply a certified, supplemental record. *Verdier v. Verdier*, 362 Ark. 660, 210 S.W.3d 123 (2005).

In a child custody matter, the record on appeal was missing the transcript from the hearing on the mother's motion for a change of venue, and the father tacitly consented to the abbreviated record by failing to object to it; as a result, the mother was ordered to provide a certified supplemental record that included the missing transcript pursuant to subsections (c) and (e) of this rule, and to file a substituted brief that included an abstract of the relevant testimony and argument of counsel pursuant to Ark. Sup. Ct. & Ct. App. R. 4-2(a). *Thomas v. Avant*, 369 Ark. 211, 252 S.W.3d 135 (2007).

Where a former ward asserted a fiduciary misconduct claim against a bank and appealed from the decision approving the bank's final accounting, remand was warranted pursuant to subsection (e) of this rule because neither the record nor the addendum con-

tained the pleadings from the ward's case in the district court, particularly the ward's complaint, the bank's answer, the district court's order granting dismissal, or any of the other pleadings considered by the circuit court in reaching its determination. *Heard v. Regions Bank*, 369 Ark. 274, 253 S.W.3d 422 (2007).

On appeal from a judgment of forfeiture, a rebriefing and a supplemental record were necessary because the appellant forfeiter's brief did not contain an abstract of the relevant colloquies between the trial court and counsel as required by Ark. Sup. Ct. & Ct. App. R. 4-2(a)(5) and the record contained no hearing transcript. \$ 1834.00 U.S. Currency v. State, 371 Ark. 471, 267 S.W.3d 593 (2007).

Rebriefing was needed in the event that the appeal was pursued, because several items were missing, and it appeared that the counterclaims and related orders were not in either the record or the addendum; it was strongly recommend that the parties review their arguments and addendum to determine whether the addendum should be supplemented with any other pleadings or documents to support its arguments on appeal. *Jenkins v. APS Ins., LLC*, 2012 Ark. App. 368, — S.W.3d —, 2012 Ark. App. LEXIS 486 (May 30, 2012).

Matter Not Properly Included in Record.

Where the appellant alleged that the transcript contained an exhibit not properly included in the record, the record was certified to the trial court to determine whether or not the exhibit was properly in the record and, if not, to correct the record so that it would disclose what actually occurred in the trial court. *Howard v. Howard*, 610 S.W.2d 285 (Ark. Ct. App. 1981).

Under this rule, mother was expected to include in her record all documents and information necessary for the appellate court to consider her arguments on appeal, however, because the divorce decree was not included in the record, it was impossible for the appellate court to determine if the circuit court retained exclusive, continuing jurisdiction; thus, mother was ordered to supply the appellate court within 60 days a certified, supplemental record that included the divorce decree, father's motion for a change of custody, and a transcript of the hearing containing any pertinent information concerning the question of subject-matter jurisdiction. *West v. West*, 362 Ark. 456, 208 S.W.3d 776 (2005).

Record of Conferences.

Where conferences held at the bench and in chambers were not recorded but were only noted as having been held and where substantive matters were discussed during these conferences, the case was remanded to the trial court to settle the record. *Fountain v. State*, 269 Ark. 454, 601 S.W.2d 862 (1980).

Reopening Records.

The trial court had no authority to reopen the record to include a document not introduced at trial. *Tackett v. First Sav.*, 306 Ark. 15, 810 S.W.2d 927 (1991).

Statement Based on Recollection.

An attempt by the defendant's counsel to remedy his failure to request that voir dire be reported, by submitting to the Supreme Court a reconstruction of the voir dire proceedings, based on recollection, was improper since he failed to first submit his own statement of the omitted proceedings to opposing counsel and, if necessary, to the trial court, and it is clear that the procedures outlined in subsection (d) of this rule are to be pursued in the trial court and not in the Supreme Court on appeal. *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981).

Sufficiency of Record.

When a record cannot be settled pursuant to this rule, reversible error exists. *Holiday Inns, Inc. v. Drew*, 276 Ark. 390, 635 S.W.2d 252 (1982).

Trial transcript combined with supplemental transcripts generated from reconstruction hearings were found sufficient for consideration of the merits of appeal. *Hood v. State*, 329 Ark. 21, 947 S.W.2d 328 (1997).

Counsel filing *Anders* brief stating that the appeal of a criminal defendant's conviction has no merit and is frivolous must attach the complete record of the proceedings below to the record on appeal so that the trial court can determine if the appeal is truly frivolous. *Campbell v. State*, 74 Ark. App. 277, 53 S.W.3d 48 (2001).

Section 9-27-341(b)(3)(B)(ix)(d)(2) clearly requires that the pleadings and testimony from hearings prior to a parental rights termination hearing are to be incorporated by reference into the trial record, and there is no language in the statute that can be interpreted to mean that those proceedings must also be designated as a part of the appeal record; such an interpretation of the statute would be inconsistent with subsection (b) of this rule, which clearly permits the appellant in civil cases to determine, at the appellant's own risk, what parts of the record in the trial court the appellant considers necessary for the prosecution of the appeal, subject to the right of the appellee to designate additional parts of the record to be included in the appeal record, if the appellee deems a transcript of other parts of the proceedings to be necessary. *Cobbs v. Ark. Dep't of Human Servs.*, 87 Ark. App. 188, 189 S.W.3d 487 (2004).

Facts of the case did not fall within the ambit of subsection (c) of this rule where there was nothing to indicate that the lawyer, as the appellee, in any way agreed to an

abbreviated record or acquiesced in the filing of the same; there was nothing to suggest that the lawyer ever saw the record filed in the case as there was no indication that he was notified of its filing and the lawyer did not check out the record in the case or file an appellee's brief. *Johnson v. Simes*, 361 Ark. 18, 204 S.W.3d 58 (2005).

On review of a termination hearing, the court denied a motion filed by the Arkansas Department of Human Services (ADHS) to order appellant mother to abstract portions of the record that she did not include in her brief as the ADHS was free to designate additional parts of the record. *Rawles v. Ark. Dep't of Human Servs.*, 89 Ark. App. 331, 202 S.W.3d 547 (2005).

Because appellant's abstract was deficient, appellant was ordered pursuant to subsections (c) and (e) of this rule, to supply the Arkansas Supreme Court with a certified, supplemental record, including a transcript of the hearing held before the circuit court. *Selmon v. Metro. Life Ins. Co.*, 371 Ark. 306, 264 S.W.3d 547 (2007).

In a client's appeal of an order awarding judgment to a company on its tortious interference with a contract claim, any arguments presented in a written motion or certified supplement to the record were not preserved for appellate review; the record as it stood conformed to the truth of what occurred, as required by subsection (e) of this rule. *Advanced Env'tl. Recycling Techs. v. Advanced Control Solutions, Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008).

Supplemental Record Ordered.

Pursuant to subsections (c) and (e) of this rule, the court ordered the purported landowner to (1) supply the court with a certified, supplemental record that included a complete trial transcript and the proof of service, if part of the proceedings below, within 60 days of the issuance of this opinion, and (2) file a substituted brief that included an abstract of the complete trial transcript and an addendum as required by Ark. Sup. Ct. & Ct. App. R. 4-2(a)(5). *Chiodini v. Lock*, 2009 Ark. 343, 322 S.W.3d 9 (2009).

Because the record did not include a certificate under Ark. R. Civ. P. 54(b)(2), it was likely that there was not yet a final order and that the appellate court had no jurisdiction to hear the appeal. Pursuant to subdivision (c) of this rule, the appellate court remanded the case for supplementation of the record and rebriefing. *Edgin v. Cent. United Life Ins. Co.*, 2012 Ark. App. 216, — S.W.3d —, 2012 Ark. App. LEXIS 313 (Mar. 14, 2012).

Court ordered the trial court to settle the record and ordered defendant to file a substituted abstract and brief, for purposes of subsection (e) of this rule, Ark. R. App. P.—Crim. 4, Ark. Sup. Ct. & Ct. App. R. 4-2(a)(8); the

record and brief, submitted in this appeal, allowed the court to address the case's merits. *Reyes v. State*, 2012 Ark. App. 358, — S.W.3d —, 2012 Ark. App. LEXIS 474 (May 23, 2012).

Transcript of Proceedings.

Appellant's motion for new trial and an affidavit in support thereof are not acceptable as a substitute for the record of the trial proceedings, since neither reflect the proffer of rebuttal evidence or any objection to any action of the trial court. *Taylor v. Funk*, 270 Ark. 912, 606 S.W.2d 605 (1980).

Appellate court granted a father's motion to unseal the record of the in camera testimony of two minor children in a child custody case as leaving the record sealed would prevent the father from complying with the requirement in Supreme Court Rule 4-2 and this rule that an appellant include a transcript of relevant testimony and abstract the record in its brief; a suggested alternative that appellate court consider the record in camera but leave the transcripts sealed was not an adequate substitute. *McNair v. Johnson*, 75 Ark. App. 261, 57 S.W.3d 742 (2001).

In a divorce case where the record did not contain a transcript of a hearing on a motion for a new trial, the transcript should have been included if the hearing was recorded and the transcript was inadvertently omitted from the record. If the hearing was not recorded, the parties could have reconstructed and settled the record if they wanted to include it as part of the record. *Spears v. Spears*, 2012 Ark. App. 181, — S.W.3d —, 2012 Ark. App. LEXIS 288 (Feb. 29, 2012).

Transcript Unavailable.

The fact that the prosecuting attorney had since become a circuit judge was not a reason to prevent the trial court, court clerk, court reporter, and counsel for both sides from attempting to reconstruct the record. *West v. State*, 322 Ark. 114, 907 S.W.2d 133 (1995).

In a criminal case where a life sentence without parole was imposed, the defendant was entitled to a new trial where the trial transcript was inadequate and attempts to reconstruct or settle the record had failed. *Jacobs v. State*, 327 Ark. 498, 939 S.W.2d 824 (1997).

The court reporter's inability to submit the record of testimony was good cause to grant appellant's motion for remand to the trial court. *Schlesier v. State*, 330 Ark. 219, 953 S.W.2d 575 (1997).

Cited: *City of Fort Smith v. Moore*, 269 Ark. 617, 599 S.W.2d 750 (1980); *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), criticized *Jenkins v. State*, 959 S.W.2d 57 (1997); *Worthen Bank & Trust Co. v. Walker*, 270 Ark. 868, 606 S.W.2d 382 (1980); *Gautrau v. Long*, 271 Ark. 394, 609 S.W.2d 107 (1980); *Brady v. Alken, Inc.*, 273 Ark. 147, 617 S.W.2d 358

(1981); *Davis v. C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981); *Askins v. Askins*, 5 Ark. App. 64, 632 S.W.2d 249 (1982); *Proposed Annexation to Beaver v. Ratliff*, 282 Ark. 516, 669 S.W.2d 467 (1984); *Hammock v. Grayson*, 284 Ark. 367, 681 S.W.2d 352 (1984); *Arkansas State Hwy. Comm'n v. Schell*, 13 Ark. App. 293, 683 S.W.2d 618 (1985); *United States v. Davidson*, 14 Ark. App. 194, 686 S.W.2d 455 (1985); *Brown v. State*, 291 Ark. 137, 722 S.W.2d 600 (1987); *Brown v. State*, 291 Ark. 393, 725 S.W.2d 544 (1987); *Bell v. State*, 296 Ark. 458, 757 S.W.2d 937 (1988); *Jurney v. State*, 298 Ark. 91, 766 S.W.2d 1 (1989); *Jones v. Goodson*, 298 Ark. 434, 768 S.W.2d 33 (1989); *Salamo v. Supreme Court Comm. on Professional Conduct*, 301 Ark. 348, 783 S.W.2d 858 (1990); *Morris v. State*, 302 Ark. 532, 792 S.W.2d 288 (1990); *Yates v. State*, 303 Ark. 79, 794 S.W.2d 133 (1990); *Jasper v. Johnny's Pizza*, 305 Ark. 318, 807

S.W.2d 664 (1991); *Shankle v. State*, 309 Ark. 40, 827 S.W.2d 642 (1992); *Jacobs v. State*, 321 Ark. 561, 906 S.W.2d 670 (1995); *McPeck v. White River Lodge Enters.*, 321 Ark. 565, 905 S.W.2d 70 (1995); *McGehee v. State*, 323 Ark. 704, 916 S.W.2d 756 (1996); *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996); *Hood v. State*, 324 Ark. 457, 920 S.W.2d 853 (1996); *Finch v. State*, 329 Ark. 319, 947 S.W.2d 11 (1997); *National Std. Ins. Co. v. Westbrook*, 331 Ark. 445, 962 S.W.2d 355 (1998); *Hodges v. Cannon*, 68 Ark. App. 170, 5 S.W.3d 89 (1999); *Moix-McNutt v. Brown*, 345 Ark. 289, 45 S.W.3d 384 (2001); *Lewis v. State*, 354 Ark. 359, 123 S.W.3d 891 (2003); *George v. Ark. Dep't of Human Servs.*, 88 Ark. App. 135, 195 S.W.3d 399 (2004); *West v. West*, 364 Ark. 73, 216 S.W.3d 557 (2005); *Foremost Ins. Co. v. Miller County Circuit Court*, 2009 Ark. 636, — S.W.3d —, 2009 Ark. LEXIS 827 (2009).

Rule 7. Certification and transmission of record.

(a) *Certification.* The clerk of the circuit court that entered the judgment, decree, or order from which the appeal is taken shall certify the record as being a true and correct copy of the record as designated by the parties.

(b) *Transmission.* After the record has been duly certified by the clerk, it shall be the responsibility of the appellant to transmit such record to the clerk of the appellate court for filing and docketing. (Adopted and amended July 10, 1995, effective January 1, 1996; amended June 7, 2001, effective July 1, 2001.)

Reporter's Notes to Rule 7 (1995): This rule tracks former Appellate Rule 7 without change. The Reporter's Notes prepared in connection with former Appellate Rule 7 are set out below.

Reporter's Notes to Rule 7: 1. Rule 7 defines the duties of the clerk of the trial court and the appellant. It is the clerk's duty to certify the record and it is the duty of the appellant to transmit the record to the Arkansas Supreme Court. Superseded *Ark. Stat. Ann.* 27-2127.8 (Repl. 1962) required the court clerk to transmit the record to the Supreme Court although the clerk seldom performed such duty. Generally, counsel for appellant assumed this responsibility under

prior Arkansas law and this rule should have little effect on actual practice in Arkansas.

Addition to Reporter's Notes, 2001 Amendment: The reference to the "clerk of the trial court" in subdivision (a) has been replaced with "clerk the circuit court that entered the judgment, decree, or order from which the appeal is taken." In subdivision (b), the phrase "the clerk of the trial court" has been reduced to simply "the clerk." In most cases, the circuit clerk serves as clerk of the circuit court. However, in some counties the county clerk handles probate matters. This division of labor is discussed in the 2001 Reporter's Note accompanying Rule 3 of the Rules of Civil Procedure.

CASE NOTES

Responsibility for Timely Filing.

Under this rule it is the responsibility of the party and his attorney to timely file the record

in an appeals case to the Court of Appeals. *Davis v. C & M Tractor Co.*, 2 Ark. App. 150, 617 S.W.2d 382 (1981).

Rule 8. Stay pending appeal.

(a) *Supersedeas defined; necessity.* A supersedeas is a written order commanding appellee to stay proceedings on the judgment, decree or order being appealed from and is necessary to stay such proceedings.

(b) *Supersedeas; by whom issued.* A supersedeas shall be issued by the clerk of the circuit court that entered the judgment, decree or order being appealed from unless the record has been lodged with the appellate court in which event the supersedeas shall be issued by the clerk of the appellate court.

(c) *Supersedeas bond.* Whenever an appellant entitled thereto desires a stay on appeal, he shall present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be to the effect that appellant shall pay to appellee all costs and damages that shall be affirmed against appellant on appeal; or if appellant fails to prosecute the appeal to a final conclusion, or if such appeal shall for any cause be dismissed, that appellant shall satisfy and perform the judgment, decree or order of the circuit court.

(d) *Proceedings against sureties.* If security is given in the form of a bond or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the circuit court and irrevocably appoints the clerk of the circuit court that entered the judgment, decree, or order as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion in the circuit court without the necessity of an independent action. The motion and such notice of the motion as the circuit court prescribes shall be filed with the clerk, who shall forthwith mail copies to the sureties if their addresses are known. (Adopted and amended July 10, 1995, effective January 1, 1996; amended June 7, 2001, effective July 1, 2001.)

Reporter's Notes to Rule 8 (1995): This rule tracks former Appellate Rule 8 without change. The Reporter's Notes prepared in connection with former Appellate Rule 8 are set out below.

Reporter's Notes to Rule 8: 1. Rule 8 revises and consolidates prior Arkansas law concerning stays during appeal. Section (a) is a consolidation of superseded *Ark. Stat. Ann.* 27-2119 and 27-2120 (Repl. 1962). It continues the requirement that a supersedeas be obtained in order to stay an appeal.

2. Section (b) permits the trial court clerk to issue a supersedeas up until the time the appeal has been docketed with the Arkansas Supreme Court. After such date, the supersedeas must be issued by the clerk of the Arkansas Supreme Court. Under superseded *Ark. Stat. Ann.* 27-2122 and 27-2123 (Repl. 1962), a trial court clerk was limited to a period of thirty days following the entry of judgment within which to issue a supersedeas. Under Rule 8, the trial court clerk may issue a supersedeas until such time as the record is filed with the Arkansas Supreme Court.

3. Section (c) largely follows superseded *Ark. Stat. Ann.* 27-2121 (Repl. 1962) which

was largely repealed by superseded *Ark. Stat. Ann.* 27-2121.1 (Repl. 1962). No appreciable change in prior Arkansas law is effected by this section.

4. Section (d) is taken from Rule 8(b) of the Federal Rules of Appellate Procedure and is generally in accord with prior Arkansas law.

Addition to Reporter's Notes, 2001 Amendment: The references to "court" in subdivision (b) and to "trial court" in subdivisions (c) and (d) have been replaced with "circuit court." Under Constitutional Amendment 80, the circuit courts are the "trial courts of original jurisdiction" in the state.

In subdivision (b) and the first sentence of subdivision (d), the clerk of the trial court is now referred to as the "clerk of the circuit court that entered the judgment, decree, or order." In the third sentence of subdivision (d), the reference is simply to "the clerk." In most cases, the circuit clerk serves as clerk of the circuit court. However, in some counties the county clerk handles probate matters. This division of labor is discussed in the 2001 Reporter's Note accompanying Rule 3 of the Rules of Civil Procedure.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey of Arkansas Law: Civil Procedure, 6 U. Ark. Little Rock L.J. 97.

CASE NOTES

ANALYSIS

Construction.

Appeal rendered moot by payment.
Authority in absence of supersedeas.
Costs and damages.
Effect of supersedeas.
—Filing of bond.
Payment of judgment.
Removal of supersedeas.
Stay ordered by appellate court.
Supersedeas bond.

Construction.

The language of subsection (c) of this rule is discretionary. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Appeal Rendered Moot by Payment.

If, as a matter of right, the payer of an outstanding judgment could have posted a supersedeas bond instead of paying the judgment, he must show that he was unable to post such a bond, or his payment of the judgment is deemed voluntary and his appeal from the judgment is rendered moot. *Lytle v. Citizens Bank*, 4 Ark. App. 294, 630 S.W.2d 546 (1982).

Authority in Absence of Supersedeas.

Where no supersedeas or stay was issued under this rule and ARCP 62, city had authority and responsibility to furnish services to annexed area and collect franchise taxes during pendency of the appeal from annexation order. *Jackson v. City of Little Rock*, 274 Ark. 51, 621 S.W.2d 852 (1981).

Costs and Damages.

"Costs and damages" include interest on the judgment and all costs and damages for delay that may be adjudged against appellant on appeal or which may result from dismissal or affirmation of the decision appealed. *Schramm v. Piazza*, 53 Ark. App. 99, 918 S.W.2d 733 (1996).

Effect of Supersedeas.

The function of a supersedeas is to stay the execution of the judgment pending the period it is superseded, but the validity of the judgment is not effected by the stay; it is merely a legal prohibition from execution on the judgment until that prohibition has been removed by operation of law or a judgment of the Supreme Court. *Searcy Steel Co. v. Mercantile Bank*, 19 Ark. App. 220, 719 S.W.2d 277 (1986).

The issuance of a supersedeas does not have the effect of vacating the judgment but only stays proceedings thereunder to maintain the status quo until the legal prohibition contained in the supersedeas has been removed; if no writ for the execution of the judgment has been issued at the time the supersedeas is filed, no writ may be issued, but if, at the time the supersedeas becomes effective, the lien of a writ has already attached, it has only the effect of prohibiting further proceedings to enforce the lien. *Searcy Steel Co. v. Mercantile Bank*, 19 Ark. App. 220, 719 S.W.2d 277 (1986).

—Filing of Bond.

A supersedeas order relates back to the filing of a valid supersedeas bond and retroactively effects a stay during the period of time between the filing of the supersedeas bond and the filing of the supersedeas order. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Writs of garnishment issued between the date the supersedeas bond was filed and the date the supersedeas order was filed were not valid, as a retroactive stay was in effect from the date of the filing of the bond. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Where the lien of the writ of garnishment has attached before a supersedeas bond is filed, the bond has only the effect of staying further proceedings to enforce the lien and does not have the effect of releasing the lien of prior attachments. *Everett v. Wingerter*, 35 Ark. App. 139, 816 S.W.2d 613 (1991).

Payment of Judgment.

Voluntary payment of a judgment amount assessed against a party is entirely inconsistent with a subsequent appeal directly related to that payment. *Shepherd v. State Auto Property & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993).

Appellants' appeal was not inconsistent with their acceptance of the judgment amounts, where the judgment awards that were accepted were the appellants in any event, their claims on appeal expressly going to additional awards. *Shepherd v. State Auto Property & Cas. Ins. Co.*, 312 Ark. 502, 850 S.W.2d 324 (1993).

Removal of Supersedeas.

When the judgment-debtor's appeal from the order of the circuit court, holding that

service of its writ of garnishment against the bank was not proper, was dismissed, the prohibition of the supersedeas against further proceedings under the writ of garnishment was removed. *Searcy Steel Co. v. Mercantile Bank*, 19 Ark. App. 220, 719 S.W.2d 277 (1986).

Stay Ordered by Appellate Court.

Once an appeal has been docketed in the Court of Appeals, its jurisdiction attaches and the court may, in a proper case, direct that the order of the trial court be stayed pending a final determination on appeal. *McCluskey v. Kerlen*, 4 Ark. App. 334, 631 S.W.2d 18 (1982).

Where the adoptive parents filed a motion in the trial court to stay the trial court's order requiring the adoptive parents to relinquish custody of the minor child to his natural mother but the court had not yet acted on the motion, the Court of Appeals could grant the adoptive parents' application for an order staying the custodial order of the trial court pending their appeal where the record showed that the adoptive parents had cared for the child since birth and there was no indication that imminent danger to the child's welfare would result. *McCluskey v. Kerlen*, 4 Ark. App. 334, 631 S.W.2d 18 (1982).

Supersedeas Bond.

The pledge of property is a kind of surety that exists and is provided for under subsection (c) of this rule. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

This Rule provided sufficient latitude for court to accept an unsecured pledge of property as a valid supersedeas bond. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

Where property is pledged for a supersedeas bond the fair market method of valuation is appropriate for determining value of the property. *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991).

A pledge of cash in an amount sufficient to satisfy the judgment if affirmed on appeal is an acceptable alternative to a personal or corporate bond. *Everett v. Wingerter*, 35 Ark. App. 139, 816 S.W.2d 613 (1991).

A letter of credit can constitute an acceptable surety for purposes of a supersedeas bond. *Home Mut. Fire Ins. Co. v. Jones*, 62 Ark. App. 182, 969 S.W.2d 675 (1998).

An irrevocable letter of credit in the principal amount of a judgment was insufficient to obtain supersedeas since this amount was less than what would be owed on the judgment if it were affirmed, if the appeal were dismissed, or if the appellant failed to prosecute the appeal on some other ground. *Home Mut. Fire Ins. Co. v. Jones*, 62 Ark. App. 182, 969 S.W.2d 675 (1998).

A supersedeas bond must be sufficient to cover all costs and damages that may result

from the appeal, including any interest that may accrue. *Jameson v. Johnson*, 343 Ark. 272, 33 S.W.3d 140 (2000).

When a trustee failed to submit a supersedeas bond with his motion for a stay of a trial court's order approving a city's condemnation ordinance, his motion was denied without considering its merits. *Wayne Alexander Trust v. City of Bentonville*, 345 Ark. 577, 47 S.W.3d 262 (2001).

Trial court had jurisdiction to enter an order requiring parties seeking to appeal the trial court's approval of a class-action settlement to post a supersedeas bond pending the outcome of the appeal where the appellate record had not yet been lodged with the appellate court at the time of the entry of the trial court's order; where there was nothing in the record to show that the trial court had abused its discretion in requiring a bond to be posted, the parties' petition for a writ of certiorari challenging the trial court's order was denied. *Ballard v. Clark County, Arkansas Circuit Court*, 347 Ark. 291, 61 S.W.3d 178 (2001).

Where remainder beneficiaries appealed a judgment in a trust suit allowing the lifetime beneficiary to invade the trust for her expenses, the court did not err when it required appellants to post a bond in the amount of \$181,792.28; the court properly took into account the costs and damages to which the lifetime beneficiary would be entitled if she prevailed on appeal. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004).

In an appeal involving the interpretation of a trust agreement, the trust assets did not replace the need for a supersedeas bond; the bond was needed to secure the funds necessary to ensure that the needs of the elderly beneficiary would be met during the pendency of the appeal. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004).

Circuit court erred in granting the class member's request for a supersedeas bond as the injury the nursing home complained of was having to provide a bond prior to judgment and, by the time the issue could be reviewed after a judgment was entered, the bond would have served the improper purpose of protecting a judgment that had not been entered; the injury would be done and, thus, the right of appeal was not an adequate remedy under these circumstances. *Beverly Enters.-Ark., Inc. v. Circuit Court*, 367 Ark. 13, 238 S.W.3d 108 (2006).

In a trust's unlawful detainer proceeding against the debtor, the debtor's motions to stay order pending appeal and for belated brief were denied as the supersedeas bond was a threshold requirement of this rule, which was not met, and the debtor failed to meet court deadlines after several extensions.

Harris v. Montgomery Testamentary Trust, 370 Ark. 518, 262 S.W.3d 145 (2007).

Cited: Festinger v. Kantor, 272 Ark. 411, 616 S.W.2d 455 (1981); Koroklo v. Koroklo, 302 Ark. 96, 787 S.W.2d 241 (1990); Unborn

Child Amendment Comm. v. Ward, 318 Ark. 165, 883 S.W.2d 817 (1994); Ouachita Trek & Dev. Co. v. Rowe, 341 Ark. 456, 17 S.W.3d 491 (2000); Larscheid v. Arkansas Dep't of Human Servs., 343 Ark. 580, 36 S.W.3d 308 (2001).

Rule 9. Extension of time when clerk's office is closed.

Whenever the last day for taking any action under these rules or under the Rules of the Supreme Court and Court of Appeals falls on a Saturday, Sunday, legal holiday, or other day when the clerk's office is closed, the time for such action shall be extended to the next business day. (Adopted May 5, 1980; adopted and amended July 10, 1995, effective January 1, 1996; amended January 22, 2004.)

Reporter's Notes to Rule 9 (1995): This rule is identical to former Appellate Rule 9.

Addition to Reporter's Notes, 2004 Amendment: The rule has been amended to address the situation in which the clerk's office is closed for reasons other than week-

ends and legal holidays. This change mirrors an amendment to Ark. R. Civ. P. 6(a) in 2003 that incorporates the Supreme Court's holding in *Honeycutt v. Fanning*, 349 Ark. 324, 78 S.W.3d 96 (2002).

CASE NOTES

ANALYSIS

Applicability.
Illustrative cases.

Applicability.

Supreme Court and Court of Appeals Rules 20(a) and 29(6) [now see S. Ct. & Ct. App. Rules 2-3 and 2-4] should be revised to remove the strict 17 calendar day requirement for filing petitions for review and rehearing so that this rule will apply to the time limits on those petitions. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 311A, 722 S.W.2d 598 (1987).

Illustrative Cases.

Where the filing deadline fell on Saturday, July 2, 1994, and was also followed by a legal holiday, Monday, July 4, 1994, the notice of appeal was timely filed on the following business day, Tuesday, July 5, 1994. *Watanabe v.*

Webb, 320 Ark. 375, 896 S.W.2d 597 (1995), appeal dismissed 321 Ark. 569, 905 S.W.2d 70 (1995).

Cross-appeal which was filed December 27, 1995, was timely filed with the clerk of the court that entered the judgment, even though December 23, 1995, was the tenth day after receipt of notice of appeal; under this rule, whenever the last day for taking action falls on a Saturday, Sunday, or legal holiday, the time for such action shall be extended to the next business day, and in the case at bar December 23 was a Saturday, December 24 was a Sunday, and December 25 and 26 were legal holidays; therefore, December 27 was the next business day. *Flemings v. Littles*, 324 Ark. 112, 918 S.W.2d 718 (1996).

Cited: *Markham v. State*, 303 Ark. 438, 798 S.W.2d 58 (1990).

Rule 10. Uniform paper size.

All notices of appeal, motions, orders, records, transcripts, and other papers required or authorized by these rules shall be on 8 1/2" x 11" paper. (Adopted May 15, 1989; adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 10 (1994) [(1995)]: This rule is identical to former Appellate Rule 10.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

Rule 11. Certification by parties and attorneys; frivolous appeals; sanctions.

(a) The filing of a brief, motion or other paper in the Supreme Court or the Court of Appeals constitutes a certification of the party or attorney that, to the best of his knowledge, information and belief formed after reasonable inquiry, the document is well grounded in fact; is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; is not filed for an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and that the document complies with the requirements of Rule of Civil Procedure 5(c)(2) regarding redaction of confidential information. A party or an attorney who files a paper in violation of this rule, or party on whose behalf the paper is filed, is subject to a sanction in accordance with this rule.

(b) The Supreme Court or the Court of Appeals shall impose a sanction upon a party or attorney or both for (1) taking or continuing a frivolous appeal or initiating a frivolous proceeding, (2) filing a brief, motion, or other paper in violation of subdivision (a) of this rule, (3) prosecuting an appeal for purposes of delay in violation of Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, and (4) any act of commission or omission that has an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. For purposes of this rule, a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.

(c) Sanctions that may be imposed for violations of this rule include, but are not limited to, dismissal of the appeal; striking a brief, motion, or other paper; awarding actual costs and expenses, including reasonable attorneys' fees; imposing a penalty payable to the court; awarding damages attributable to the delay or misconduct; and, where there has been delay, advancing the case on the docket and affirming.

(d) A party may by motion request that a sanction be imposed upon another party or attorney pursuant to this rule, or the court may impose a sanction on its own initiative. A motion shall be in the form required by Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, with citations to the record where appropriate, and will be called for submission three weeks after filing. The opposing party may file a response within 21 days of the filing of the motion. If the court on its own initiative determines that a sanction may be appropriate, the court shall order the party or attorney to show cause in writing why a sanction should not be imposed on the party or attorney or both. (Added November 18, 1996, effective March 1, 1997; amended October 23, 2008, effective January 1, 2009.)

Reporter's Notes to Rule 11: This rule, added in 1997, addresses frivolous appeals and other misconduct, topics that were heretofore not covered by these rules. The Supreme Court has held that Rule 11 of the Rules of Civil Procedure does not apply on appeal, *Wright v. Eddinger*, 320 Ark. 151, 894

S.W.2d 937 (1995), and the Rules of the Supreme Court and the Court of Appeals deal only with specific problems, such as insufficient abstracts and appeals prosecuted for purposes of delay. In contrast, Rule 38 of the Federal Rules of Appellate procedure expressly provides for an award of "just dam-

ages and single or double costs” to the appellee if an appeal is frivolous, and two federal statutes also deal with the issue. See 28 U.S.C. §§ 1912, 1927.

Rule 11 does not follow the federal model because confusion has arisen in the federal courts as to the relationship between Rule 38 and the two statutes. Rather, the new rule is based on a proposal offered in response to the problems that have arisen under the federal provisions. See Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 Duke L.J. 845. In addition, the new rule contains a cross-reference to Rule 6-2 of the Rules of the Supreme Court and Court of Appeals, which addresses delay, and sets forth the same procedure specified in that rule.

Addition to Reporter's Notes, 2008

Amendment: Subdivision (a) has been amended by adding a new element to the certifications made by a party or an attorney when that person signs a brief, motion, or other paper, including a petition for rehearing or review. The change parallels the 2008 amendment to Rule of Civil Procedure 11. When counsel or a pro se litigant signs a brief, motion, petition, or other paper filed with the appellate court, the person is also certifying compliance with Administrative Order 19's mandate for redaction of necessary and relevant confidential information in the paper being filed. The redaction/filing-under-seal procedure for confidential information is outlined in Rule of Civil Procedure 5(c)(2)(A) & (B) and explained in the Addition to Reporter's Notes, 2008 Amendment to that Rule.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments — 1997 Amendments to the Arkansas Rules of Civil Procedure and the Rules of Appellate Procedure — Civil, 50 Ark. L. Rev. 149.

Bryan, *Arkansas Rule of Appellate Procedure 11: What Should the Practitioner Expect?*, 53 Ark. L. Rev. 661.

CASE NOTES

ANALYSIS

Child custody.
False claims.
Frivolous appeal.
Jurisdiction.
Sanctions affirmed.

Child Custody.

Supreme Court imposed sanctions on party in custody case who continued to seek a change of custody based on allegations of changes in circumstances that occurred prior to the last custody order, contrary to Supreme Court's directive in earlier opinions. *Jones v. Jones*, 329 Ark. 320, 947 S.W.2d 6 (1997).

False Claims.

In a class action proceeding, the bank argued on appeal that the partial summary-judgment order entered in the circuit court was final even though no damages had been awarded, while at the same time arguing in the circuit court that no final order had been entered; although the bank eventually conceded that the partial summary-judgment order was not final, the Arkansas Supreme Court disagreed with the bank's assertion that it acted in good faith and upheld an award of sanctions in the form of costs and attorney fees. *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003).

Frivolous Appeal.

Where the court determined that counsel's petition offered what appeared to be frivolous and argumentative assertions, the court in-

voked this rule and ordered counsel to show cause why sanctions should not be imposed. *Jones v. Jones*, 328 Ark. 684, 944 S.W.2d 121 (1997).

Reasonable attorney's fees would be awarded for work in responding to a petition where the legal argument and request in the petition to depart from present case law were dependent upon statements of facts that could not be found in the record and, therefore, were not well grounded. *Financial Benefit Life Ins. Co. v. Weedman*, 333 Ark. 269, 968 S.W.2d 624 (1998).

The appellants' motion was frivolous because it was not well grounded in fact or warranted by existing law, and caused a needless increase in the cost of litigation to the appellees and, as a result, attorneys' fees and costs were awarded. *Eads v. Hall*, 340 Ark. 375, 10 S.W.3d 441 (2000).

Attorney-appellant was ordered to show cause in writing why a sanction should not be imposed against him where he continued pursuit of an appeal even though the decision in another identical action commenced by him disposed of the identical issue on appeal more than four months earlier. *Stille v. Hubbs*, 344 Ark. 1, 40 S.W.3d 209 (2001).

The appellate court granted the department store's motion for sanctions for imposition of costs and attorney fees against the injury victim because there was no violation of any of the Arkansas Rules of Professional Conduct by the department store's counsel, as

alleged by the victim, and, therefore, there was no factual or legal support for the appeal. *Whaley v. Kroger Co.*, 352 Ark. 122, 98 S.W.3d 824 (2003).

Jurisdiction.

Allegations that petition filed in trial court was in disrespect of and the disregarded the Supreme Court's authority and its prior decisions must be addressed by the trial court under this rule, and not in a motion filed with the Supreme Court for sanctions under this rule. *Jones v. Jones*, 329 Ark. 320, 947 S.W.2d 6 (1997).

Sanctions Affirmed.

Contrary to the attorney's argument, the father, through his guardian ad litem, did not

file a motion for contempt under § 16-10-108(c), but rather filed a motion to quash the deposition, which contained a request for sanctions under this rule; the trial court did not enter a contempt order against the attorney, but he argued such on appeal and did not develop an argument regarding the sanctions under this rule, and because he failed to do so, the court refused to develop an argument for him and thus the court affirmed. *McDermott v. Sharp*, 371 Ark. 462, 267 S.W.3d 582 (2007).

Cited: *Jones v. Jones*, 328 Ark. 97, 940 S.W.2d 881 (1997); *In re Davis*, 345 Ark. 46, 43 S.W.3d 156 (2001).

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Publisher's Notes. By Per Curiam Dec. 4, 1995, the Supreme Court of Arkansas moved two of the criminal appellate rules adopted

July 10, 1995 to be ARCrP 33.2 and ARCrP 33.3, and renumbered the Rules of Appellate Procedure — Criminal accordingly.

Rule 1. Right of appeal.

(a) *Right of appeal.* Any person convicted of a misdemeanor or a felony by virtue of trial in any circuit court of this state has the right to appeal to the Arkansas Court of Appeals or to the Supreme Court of Arkansas. An appeal may be taken jointly by codefendants or by any defendant jointly charged and convicted with another defendant, and only one (1) appeal need be taken where a defendant has been found guilty of one (1) or more charges at a single trial. Except as provided by ARCrP 24.3(b) there shall be no appeal from a plea of guilty or nolo contendere.

(b) *Precedence.* Appeals in criminal cases shall take precedence over all other business of the Supreme Court. Appeals under RAP-Civ 2(a)(6), (7), and (9) shall take next precedence in the Supreme Court.

(c) *Death of defendant.* Upon the death of a defendant, the appeal shall not abate. The appeal shall continue on the relation of a representative party as provided in Ark. R. Civ. P. 25(a). (Amended July 13, 1987, effective October 1, 1987; adopted and amended July 10, 1995, effective January 1, 1996; amended December 9, 2004, effective January 1, 2005.)

Reporter's Notes to Rule 1 (1995): Subsection (a) is former ARCrP 36.1 modified only by substituting "ARCrP 24.3" for "Rule 24.3." The first sentence of subsection (b) is former ARCrP 36.2. The second sentence is former ARAP 2(c) slightly modified. Subsection (c) is former ARCrP 36.3.

Addition to Reporter's Notes, 2004

Amendment Subsection (c) was amended in 2004 to permit an appeal to continue following the death of a defendant. Prior to this amendment, no appeal could be taken after the death of a defendant, and any appeal taken during a defendant's life abated upon his death. This situation could create collateral consequences to the estate and heirs of a

defendant. For example, assume that a defendant convicted of homicide is the beneficiary of an insurance policy insuring the life of the homicide victim. If the defendant dies while the conviction is on appeal, the continuation of the appeal is the only way for the defendant's estate to challenge the conviction. As a party in privity with the defendant, the estate would be collaterally estopped from relitigating the defendant's guilt in a subsequent civil proceeding to determine the disposition of the

insurance proceeds. See *Zinger v. Terrell*, 336 Ark. 423, 985 S.W. 2d 737 (1999) (murder conviction bars defendant from relitigating guilt in subsequent civil proceeding). Similarly, the judgment of conviction may order a defendant to pay a substantial fine or restitution. This potential claim against the defendant's estate could not be contested by the estate if the opportunity to challenge the conviction is extinguished by the death of the defendant.

1987 Unofficial Supplementary Commentary to former Rule 36.1 [now RAP-Crim 1]

As originally proposed in April 1974, Rule 36.1 contained a provision permitting an appeal from a guilty plea under narrowly defined circumstances. See, original commentary to Rule 36.1. The Arkansas Supreme Court removed this provision from the rule, so there is no right to appeal from a plea of guilty or *nolo contendere*.

The Per Curiam order of the Supreme Court of March 3, 1980 read: "There is now an Appellate Public Defender for the State of Arkansas whose duty is to represent all indigent persons on appeals to the Court of Appeals and to the Supreme Court in criminal cases. Any attorney, who has been retained or appointed, and any public defender, who rep-

resents a person who is, or has become, indigent, shall have the responsibility for seeing that a notice of appeal is given and a transcript ordered in the trial court, if that person desires to take an appeal. If counsel was retained he shall, prior to the giving of notice of appeal, be responsible for showing his client's indigency in the trial court. Trial counsel may be relieved only by applying to the Supreme Court or Court of Appeals, whichever may be appropriate, for permission to withdraw and for substitution of the Appellate Public Defender for prosecution of the appeal. The motion to withdraw shall be filed simultaneously with the filing of the transcript."

CASE NOTES

ANALYSIS

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In General.

Both § 16-91-101(c) and this rule provide that there shall be no appeal from a plea of guilty; however, one exception is found in ARCrP 24.3(b), which provides a procedure for a defendant to seek review of an adverse determination of a pretrial motion to suppress evidence. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

Acts 1993, No. 535, which is codified in part as § 16-97-101 et seq., provided, in part, that all laws in conflict with the act were repealed, thus repealing § 16-91-101(c). *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

There is a significant and inherent differ-

ence between appeals brought by criminal defendants and those brought on behalf of the state: the former is a matter of right, and to cut off a defendant's right to appeal because of his attorney's failure to follow rules would violate the Sixth Amendment right to effective assistance of counsel; the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to RAP-Crim 3. *Bowden v. State*, 326 Ark. 266, 931 S.W.2d 104 (1996).

Construction.

The new code provision, § 16-97-101, which provides for sentencing by a jury after a plea of guilty under certain conditions, is not repugnant to this rule, which provides in part that except as provided by ARCrP 24.3(b) there shall be no appeal from a plea of guilty or *nolo contendere*; the statute is to stand as compatible with the rule, recognizing that the legislature has provided not only for separate and distinct procedures governing jury trials and sentencing by jury, but for evidentiary matters as well. *Hill v. State*, 318 Ark. 408, 887 S.W.2d 275 (1994).

Under subsection (a) of this rule, one is not allowed to appeal from a conviction resulting from a plea of guilty or *nolo contendere*; ARCrP 24.3(b) presents an exception to the

rule, but only for the purpose of determining on appeal whether an appellant should be allowed to withdraw his or her plea if it is concluded that evidence should have been, but was not, suppressed. *Wofford v. State*, 330 Ark. 8, 952 S.W.2d 646 (1997).

Appeal Denied.

Defendant was precluded from raising on appeal that the trial court abused its discretion when it sentenced him to a term of years without just cause for departure from the sentencing guidelines, because defendant pled guilty and neither of the exceptions under Ark. R. Crim. P. 24.3(b) applied. *Howerton v. State*, 2012 Ark. App. 331, — S.W.3d —, 2012 Ark. App. LEXIS 437 (May 9, 2012).

Appealable Judgments.

Because the plain language of subsection (a) of this rule and § 16-91-101(a) required a conviction before a defendant had a right of appeal, and because a disposition pursuant to Act 346 of 1975, better known as the Arkansas First Offender Act, §§ 16-93-301 — 305, was not a conviction, defendant had no right to appeal. *Lynn v. State*, 2012 Ark. 6, — S.W.3d —, 2012 Ark. LEXIS 9 (Jan. 12, 2012).

Constitutional Issues.

Defendant's argument that § 27-101-105 violated the Fourth Amendment to the United States Constitution and Ark. Const. Art. II, § 15 was not preserved for appeal because defendant never raised his argument regarding the constitutionality of the statute before the trial court; because defendant failed to raise his constitutional arguments below, the court of appeals could not consider them on appeal. *Brewer v. State*, 2010 Ark. App. 275, — S.W.3d —, 2010 Ark. App. LEXIS 270 (Mar. 31, 2010).

Guilty Pleas.

Defendant who entered a guilty plea could not directly appeal the validity of his guilty plea insofar as he wished to appeal some aspect of the procedure followed at his guilty plea hearing that was an integral part of his plea. *Matthews v. State*, 305 Ark. 207, 807 S.W.2d 29 (1991).

Under former ARCrP 36.1, juvenile defendants may not appeal from a plea of guilty or *nolo contendere*, except as provided by ARCrP 24.3(b), which permits a defendant to enter a guilty plea conditioned on the reversal of a pretrial determination of a motion to suppress illegally obtained evidence; thus, where juveniles' guilty pleas for burglary and theft were not conditional and did not fall within the terms of ARCrP 24.3(b), the court was precluded from hearing their appeals. *Mason v. State*, 323 Ark. 361, 914 S.W.2d 751 (1996).

Defendant was allowed to appeal a judgment and commitment order issued at a resentencing hearing that took place eight

days after defendant pled guilty in open court and received the recommended sentence pursuant to an agreement with the prosecuting attorney. *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003).

Dismissal of defendant's appeal was proper where the court lacked jurisdiction because defendant failed to strictly comply with ARCrP 24.3(b) since the document did not specifically state that defendant reserved his right to appeal the outcome of the suppression hearing; moreover, the document failed to demonstrate that the trial court approved a conditional plea under subsection (a) of this rule. *Hill v. State*, 81 Ark. App. 178, 100 S.W.3d 84 (2003).

Only a conditional plea pursuant to ARCrP 24.3(b) enables a defendant to retain the right to appeal an adverse suppression ruling. *Grupa v. State*, 83 Ark. App. 389, 128 S.W.3d 470 (2003).

Despite the language of subsection (a) of this rule, an appeal may be taken after a guilty plea regarding a circuit court's admission of evidence or testimony during the sentencing phase of the trial, despite the fact that the sentencing phase followed a guilty plea and regardless of whether sentencing was performed by the circuit court or a jury. *Johnson v. State*, 2010 Ark. 63, — S.W.3d —, 2010 Ark. LEXIS 89 (Feb. 12, 2010).

Limitations Periods.

The statute of limitations is "jurisdictional" in the sense of not being subject to waiver in a criminal case, but the jurisdictional nature of the alleged error does not create a basis for direct appeal to the Supreme Court, of a judgment of conviction resulting from a guilty plea. *Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993).

Nolo Contendere.

The defendant could not appeal from a sentence imposed after she entered a plea of *nolo contendere* on the grounds that the trial court committed reversible error by not disqualifying itself because of "agitation" with actions of defense counsel, resulting in an allegedly excessive sentence. *Street v. State*, 334 Ark. 432, 975 S.W.2d 827 (1998).

Appeal of defendant who had entered a plea of *nolo contendere* to two counts of theft of property was dismissed where she was arguing on appeal that the trial court erred in sentencing her to the maximum sentence when the presentence report recommended probation and in not advising her of her right to withdraw her plea, but she did not file a posttrial motion challenging the validity and legality of the sentence, and her appeal fell within none of the other exceptions to the rule against appeals from guilty pleas. *Smalley v. State*, 2012 Ark. App. 221, — S.W.3d —, 2012 Ark. App. LEXIS 327 (Mar. 28, 2012).

Preserving Issue.

The issue of sufficiency of the evidence was not preserved for appeal, where the motion for directed verdict was not renewed at the close of the evidence; the motion for judgment notwithstanding the verdict was made after the verdict; and sentencing was not sufficient to comply with the requirement of this rule. *Rowe v. State*, 36 Ark. App. 9, 816 S.W.2d 897 (1991).

The appellant properly preserved his sufficiency of the evidence issue by timely making a directed verdict motion at the end of the state's evidence and at the end of the trial. *Sanders v. State*, 308 Ark. 178, 824 S.W.2d 353 (1992).

Because defendant did not use all of his peremptory challenges, the issue concerning the trial court's alleged failure to remove jurors for cause was not preserved for review. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Because the prosecutor was allowed to continue an inquiry into defendant's initiated statement to a detective without interruption by an objection during direct and cross-examination, the issues concerning the testimony and defendant's denied motion to strike were not preserved for review due to a lack of a contemporaneous objection; however, the court chose to address the matter and found that the trial court did not err in denying defendant's motion because defendant was free to initiate contact with the detective even though defendant was represented. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Unless the matters waived by defendant fell within one of the categories to be reviewed by the court on mandatory review of defendant's murder conviction and death sentence, pursuant to RAP-Crim 10, the matters were not preserved for review because they constituted an adverse ruling where no objection was made below. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Issue related to the denial of a directed verdict was not preserved for review because defendant failed to renew the motion at the close of the rebuttal case by the state. *Moore v. State*, 362 Ark. 70, 207 S.W.3d 493 (2005).

While it could have been possible to glean the trial court's ruling from counsel's statement, the court was unable to hazard a guess as to the ruling's rationale, nor did the court have a record that might have contained any objection thereto, and the court was unable to discern whether defendant raised any arguments as to certain evidentiary rules; without such proof in the record, the court refused to reach arguments raised for the first time on appeal. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

Based upon statements made at a bench conference, defendant did not obtain a clear

ruling from the trial court on the issue in question and thus the issue was precluded from appellate review. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

Because the trial court provided no ruling on an issue, the court was precluded from reaching the issue on appellate review. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

Although defendant argued that the trial court erred in excluding evidence that the victim had cocaine in his system at the time of the murder, the court agreed with the state that the matter was not preserved for review; nowhere in the record did it show that defendant presented the trial court with the theory that the cocaine in the victim's system was relevant because his death was caused by money he owed a drug dealer. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

Defendant's collateral argument, that cocaine evidence was relevant to show drug use on the part of the state's witness, was not preserved for review, given that defense counsel did not attempt to impeach any witness with this information and when the trial court sustained the state's objection to the question of the witness concerning drugs, defense counsel neither argued that the objection should be overruled nor proffered the testimony that he would have obtained if allowed to pursue another question, and without the proffer, for purposes of Ark. R. Evid. 103(a)(2), the matter was not preserved. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

Defendant failed to preserve for appeal the issue that the State did not put him on notice that it was seeking the sentencing enhancement, because defendant failed to raise the issue of notice at trial, which precluded the appellate court from addressing it on appeal. *Bell v. State*, 101 Ark. App. 144, 272 S.W.3d 110 (2008).

Defendant failed to effectively make an argument for application of an exception that would permit the court to address the issue regarding jury polling for the first time on appeal, plus the facts of this case did not present a situation of comparable seriousness as that presented in other case law; defendant failed to make a contemporaneous objection at the conclusion of the jury poll when the trial judge inquired if there was any reason not to release the jury and impose the sentence. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009).

Defendant objected to seating a juror during voir dire and requested that the trial court dismiss her for cause, such that the point was preserved for review; case law does not support the argument that a party must make an additional objection at the conclusion of voir dire. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009).

Defendant failed to preserve for appeal his claim that the trial court erred in assessing \$300 in DWI court costs and \$200 in court costs because he failed to object to the imposition of costs before the trial court; in order to preserve the challenge to the costs assessed by the trial court, defendant was required to object to the assessment of costs before the trial court. Appellant's failure to do so precludes us from considering the issue on appeal. *Brewer v. State*, 2010 Ark. App. 275, — S.W.3d —, 2010 Ark. App. LEXIS 270 (Mar. 31, 2010).

Speedy Trial.

State has no right to appeal dismissal for failure to bring defendant to trial within 12 months. *State v. Tipton*, 300 Ark. 211, 779 S.W.2d 138 (1989).

The right to a speedy trial is waived by a guilty plea. *Eckl v. State*, 312 Ark. 544, 851 S.W.2d 428 (1993).

Standing.

A juvenile who appealed from an order of the juvenile court which granted the state's motion to nolle prosequere three charges against him, effectively transferring him back to circuit court, lacked standing to appeal the order because he had not been convicted of an offense as required by this rule. *Webb v. State*, 48 Ark. App. 216, 893 S.W.2d 357 (1995).

Time for Appeal.

In the absence of a final order of the trial court settling some issue against defendant, of finding him guilty of some offense, an appeal to the supreme court will not lie at this stage of the proceeding. *Weston v. State*, 265

Ark. 58, 576 S.W.2d 705, cert. denied 444 U.S. 965, 100 S. Ct. 453, 62 L. Ed. 2d 377 (1979).

Any person not convicted of an offense has no right of appeal to an appellate court under this rule. *Cook v. City of Pine Bluff*, 318 Ark. 190, 885 S.W.2d 7 (1994).

At the time the state filed its motion to dismiss defendant's appeal, defendant's time to file a belated appeal under Ark. R. App. P. Crim. 2(e) had not yet expired; in light of defendant's right to appeal under this rule, the court extended the time for the filing of the state's brief and held in abeyance the state's motion to dismiss. *Valenzuela v. State*, 357 Ark. 89, 160 S.W.3d 345 (2004).

Waiver.

Given that: (1) the psychological evidence indicated that defendant knew right from wrong; (2) defendant indicated an understanding that he was waiving appeal rights; and (3) the trial court asked defendant appropriate questions concerning the waiver, the trial court properly found that defendant made a knowing and intelligent waiver of appeal rights, including the right to appeal to the court and the right of postconviction challenge under ARCrP 37.5. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003).

Cited: *Pearson v. Norris*, 94 F.3d 406 (8th Cir. 1996); *Cupit v. State*, 324 Ark. 438, 920 S.W.2d 852 (1996); *Frette v. City of Springdale*, 331 Ark. 103, 959 S.W.2d 734 (1998); *Hewitt v. State*, 362 Ark. 369, 208 S.W.3d 185 (2005); *Bargo v. State*, 364 Ark. 197, 217 S.W.3d 825 (2005); *Wickham v. State*, 2009 Ark. 357, 324 S.W.3d 344 (2009).

Rule 2. Time and method of taking appeal.

(a) *Notice of Appeal.* Within thirty (30) days from

(1) the date of entry of a judgment, or

(2) the date of entry of an order denying a post-trial motion under Ark. R. Crim. P. 33.3, or

(3) the date a post-trial motion under Ark. R. Crim. P. 33.3 is deemed denied pursuant to subsection (b)(1) of this rule, or

(4) the date of entry of an order denying a petition for postconviction relief under Ark. R. Crim. P. 37,

the person desiring to appeal a circuit court judgment or order or both shall file with the clerk of the circuit court a notice of appeal identifying the parties taking the appeal and the judgment or order or both being appealed. The notice shall also state whether the appeal is to the Court of Appeals or to the Supreme Court; and if to the Supreme Court, the appellant shall designate the applicable subdivision of Supreme Court Rule 1-2(a) which gives the Supreme Court jurisdiction. This declaration shall be for the purpose of placing the case with one court or the other for preliminary administration. It shall not preclude the appellant from filing his or her

Brief pursuant to Supreme Court Rules 43 and 44 in the alternative court if that is later determined by the appellant to be appropriate.

(b) *Time for Filing.*

(1) A notice of appeal filed after the trial court announces a decision but before the entry of the judgment or order shall be treated as filed on the day after the judgment or order is entered. Upon timely filing in the trial court of a post-trial motion, the time for filing a notice of appeal shall be extended for all parties. The notice of appeal shall be filed within thirty (30) days from entry of the order disposing of the last motion outstanding. However, if the trial court neither grants nor denies the motion within thirty (30) days of its filing, the motion shall be deemed denied by operation of law as of the thirtieth day, and the notice of appeal shall be filed within thirty (30) days from that date.

(2) A notice of appeal filed before disposition of any post-trial motions shall be treated as filed on the day after the entry of an order disposing of the last motion outstanding or the day after the motion is deemed denied by operation of law. Such a notice is effective to appeal the underlying judgment or order. A party who also seeks to appeal from the grant or denial of the motion shall within thirty (30) days amend the previously filed notice, complying with subsection (a) of this rule. No additional fees will be required for filing an amended notice of appeal.

(c) *Certificate That Transcript Ordered.*

(1) If oral testimony or proceedings are designated, the notice of appeal shall include a certificate by the appealing party or his attorney that a transcript of the trial record has been ordered from the court reporter, and, except for good cause, that any financial arrangements required by the court reporter pursuant to Ark. Code Ann. § 16-13-510(c) have been made. If the appealing party is unable to certify that financial arrangements have been made, then he shall attach to the notice of appeal an affidavit setting out the reason for his inability to so certify. A copy of the notice of appeal shall be mailed to the court reporter.

(2) Alternatively, the notice of appeal shall include a petition to obtain the record as a pauper if, for the purposes of the appeal, a transcript is deemed essential to resolve the issues on appeal.

(3) It shall not be necessary to file with either the notice of appeal or the designation of contents of record any portion of the reporter's transcript of the evidence of proceedings.

(d) *Notification of Parties.* Notification of the filing of the notice of appeal shall be given to all other parties or their representatives involved in the cause by mailing a copy of the notice of appeal to the parties or their representatives and to the Attorney General, but failure to give such notification shall not affect the validity of the appeal.

(e) *Failure to Pursue Appeal.* Failure of the appellant to take any further steps to secure the review of the appealed conviction shall not affect the validity of the appeal but shall be ground only for such action as the Supreme Court deems appropriate, which may include dismissal of the appeal. The Supreme Court may act upon and decide a case in which the notice of appeal was not given or the transcript of the trial record was not filed in the time prescribed, when a good reason for the omission is shown by affidavit. However, no motion for belated appeal shall be entertained by the Supreme Court unless application has been made to the Supreme Court within eighteen (18) months of the date of entry of judgment or entry of the

order denying postconviction relief from which the appeal is taken. If no judgment of conviction was entered of record within ten (10) days of the date sentence was pronounced, application for belated appeal must be made within eighteen (18) months of the date sentence was pronounced.

(f) *Dismissal of Appeal*. If an appeal has not been docketed in the Supreme Court, the parties, with the approval of the trial court, may dismiss the appeal by stipulation filed in that court or that court may dismiss the appeal upon a motion and notice by the appellant. (Amended October 25, 1976; amended December 18, 1978; amended January 25, 1988, effective March 1, 1988; amended January 31, 1994; adopted and amended July 10, 1995, effective January 1, 1996; amended December 4, 1995; amended December 9, 1996; amended June 23, 1997; amended June 30, 1997, effective for cases in which the record is lodged on or after September 1, 1997; amended December 4, 1997; amended November 5, 1998; amended January 28, 1999; amended June 24, 1999; amended November 15, 2007.)

Court's Comment to Rule 2(b) (1995): Rule 2(b) makes clear that a notice of appeal filed on the same day as the judgment or order is effective, even though filed on that day before the judgment or order appealed from.

Reporter's Notes to Rule 2 (November, 1994): Rule 2 is former ARCrP 36.9. Subsection (b) has been modified to address cases where both a notice of appeal and a post-trial motion are filed. The subsection changes present law, under which a notice of appeal is invalid if filed before the entry of an order denying a post-trial motion or before the motion is "deemed denied" under RAP—Civ 4(c). See *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992); *Kimble v. Gray*, 313 Ark. 373, 853 S.W.2d 890 (1993) (per curiam), *affirming Kimble v. Gray*, 40 Ark. App. 196, 842 S.W.2d 473 (1992). See, also, *Giacona v. State*, 311 Ark. 664, 846 S.W.2d 185 (1993) (per curiam).

The second sentence of subsection (c) of this rule is former ARCrP 36.18.

This rule applies in ARCrP 37 cases only as to appeals from an actual denial of the Rule 37 petition: the "deemed denied" provision of RAP—Civ 4(c) does not apply to Rule 37 petitions.

Court's Comment to January 1994 Amendment: The 1993 amendment was adopted to clarify that if a post-trial motion in the nature of a motion for a new trial or amendment of judgment is not resolved by the trial court within 30 days from the date of its filing, it is deemed denied under ARAP 4(c), and an appeal must be taken within 30 days from the date the motion is deemed denied. The amended rule also provides that the "deemed denied" principle does not apply to ARCrP 37 petitions. Appeals may be taken within 30 days after a Rule 37 petition is actually denied by the trial court irrespective of whether that denial occurs more than 30 days after the petition is filed.

Addition to Reporter's Notes, 1988

Amendment: The phrase "or order denying postconviction relief" has been added to make it clear that the Supreme Court will accept a belated appeal of the denial of a petition for postconviction relief. See *Garner v. State*, 293 Ark. 309, 737 S.W.2d 637 (1987).

Note that the reference to filing a motion for belated appeal in the trial court has been deleted because the Supreme Court has held that such a motion must be filed directly in the Supreme Court because only the Supreme Court has the authority to grant a belated appeal. *Gray v. State*, 277 Ark. 442, 642 S.W.2d 306 (1982); *Hamman v. State*, 270 Ark. 307, 605 S.W.2d 6 (1980). The reference to the trial court in the current rule has resulted in confusion for both attorneys and *pro se* movants as to the court in which to file a motion for belated appeal.

The word "commitment" in Rule 36.9 [now RAP-Crim 2] also creates confusion since it is open to several interpretations and has not been defined by the Supreme Court. Some circuit judges, attorneys and *pro se* movants treat "commitment" as meaning the date judgment was entered of record in the circuit clerk's office. Others assume it to be the date sentence was pronounced by the circuit judge or the date the judge signed the judgment, regardless of when, or if, the judgment was ever filed. Still others interpret "commitment" to mean the date the convicted defendant was physically taken into custody by an officer of the Arkansas Department of Correction. (Under this interpretation, a defendant who was released on appeal bond without a notice of appeal having been filed has an advantage since this defendant's time for filing a belated appeal would not begin to run until he was taken into custody, giving him longer to proceed under the rule than the defendant who went straight to prison. This situation, while infrequent, has occurred and can be pre-

vented by changing the rule to read “entry of judgment” rather than “commitment.”)

The phrase “or entry of the order denying postconviction relief from which the appeal is taken” has been added because, as stated, Rule 36.9 [now RAP-Crim 2] does not currently indicate that there may be a belated appeal from a petition for postconviction relief.

“If no judgment of conviction was entered of record within ten (10) days of the date sentence was pronounced, application for belated appeal must be made within eighteen (18) months of the date sentence was pronounced” has been added to cover those instances where there is either no filemarked judgment from which to calculate or there was a delay of more than ten days in filing the judgment.

Addition to Reporter’s Notes, [June] 1997 Amendment: Subsection (c) has been revised to require an appellant to state in the notice of appeal that he or she not only has ordered the transcript or relevant portions thereof, but also has made the necessary financial arrangements with the court reporter for its preparation. By statute, “the court reporter’s duty to transcribe and certify the record may be conditioned upon the payment, when requested by the court reporter, of up to fifty percent (50%) of the estimated cost of the transcript.” Ark. Code Ann. § 16-13-510(c). The amendment is intended to eliminate delay that occurred under the previous version of the rule when a lawyer stated in the notice of appeal that he or she had ordered the transcript, but the court reporter did not begin work because payment had not been received or financial arrangement made. If an appellant is unable to make the certification, then it is necessary that he or she make an affidavit with the notice of appeal explaining the reasons. A copy of the notice of appeal must be sent to the court reporter. An alternative to the certification/affidavit procedure is to petition to obtain the transcript as an indigent. The failure to include these items as required renders the notice of appeal invalid.

Addition to Reporter’s Notes, [December] 1997 Amendment: Subdivision (c)(1) and (3) have been amended to take into account the situation in which no oral testimony or proceedings have been designated as part of the record on appeal. If this is the case, the notice must contain a statement that no oral testimony or proceedings have been designated.

The portion of (c)(3) concerning the invalidity of the notice of appeal was added previously by the Supreme Court. See per curiam order of June 23, 1997.

Addition to Reporter’s Notes, [January] 1999 Amendment: Former subsection (c)(3) has been deleted from the rule, and

(c)(4) has been redesignated in its place. The reasons for this amendment are discussed in *Clayton v. Ideal Chemical and Supply Co.*, 335 Ark. 73, 977 S.W.2d 228 (1998).

Addition to Reporter’s Notes, [June] 1999 Amendment: The rule has been revised to reconcile it with recent changes in the comparable Rule of Appellate Procedure—Civil, Rule 4.

Subdivision (a)(3) has been amended to reference (b)(1) of this rule which has been amended to incorporate the “deemed denied” language. Before this amendment, the rule merely referenced Rule 4(c) of the Rules of Appellate Procedure—Civil.

Subsection (b)(1) now provides that a premature notice of appeal is to be treated as if it had been filed after entry of the judgment, decree, or order. Previously, such a notice was ineffective. Additionally, the “deemed denied” language of Rule 4 of the Rules of Appellate Procedure—Civil is now contained in this rule so reference to the civil rules is no longer necessary.

Subdivision (b)(2) addresses the effect of post-trial motions on the timing of the notice of appeal. If there are multiple motions, the 30-day period for filing a notice of appeal begins to run from entry of the order disposing of “the last motion outstanding” or the date on which such motion is deemed denied by operation of law.

It further provides that a notice of appeal filed before disposition of a post-trial motion becomes effective on the day after a dispositive order is entered or the motion is deemed denied by operation of law pursuant to subsection (b)(1). The effect is to suspend a premature notice until the motion is ruled on or deemed denied, and a new notice is not necessary to appeal the underlying case. However, a party seeking to appeal from disposition of the post-trial motion must amend the original notice to so indicate. No additional fees are required in this situation, since the notice is an amendment of the original and not a new notice of appeal.

As directed in Rule 4 of the Rules of Appellate Procedure—Criminal, the time to file the record in a criminal case is governed by Rule 5 of the Rules of Appellate Procedure—Civil. Rule 5 provides that the record shall be filed and docketed “within 90 days from the filing of the first notice of appeal.” In light of the change in subsection (b)(1) of Rule 2 to treat a premature notice of appeal as filed on the day after the judgment or order is entered, it is intended that the 90 days runs from the effective date of the notice of appeal. Likewise, in other instances when the filing date of the notice of appeal is critical, it should run from the effective date of the notice.

Addition to Reporter’s Notes, 2007 Amendment: The 2007 amendment clarified

that the notice of appeal was to be filed with the circuit clerk, not the circuit judge.

Publisher's Notes. In the order announcing the January, 1999 amendment, the Court also commented that this rule was amended in 1997 to provide that a notice of appeal is

invalid if it does not contain the statement that the transcript has been ordered and financial arrangements have been made with the court reporter, and that that provision has proven to be unsatisfactory.

1987 Unofficial Supplementary Commentary to former Rule 36.9 [now RAP-Crim 2]

Belated Appeals.

A motion for belated appeal may be filed at any time within 18 months of commitment under Rule 36.9. An appeal filed after this time under Rule 37 will not be treated as a motion for belated appeal, since to do so would double the time for requesting a belated appeal, Rule 37 petitions being permitted for 36 months after commitment. See *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986).

Belated Appeal: Motion to Be Made to Supreme Court.

Belated appeal motions must be made to the Supreme Court, not to the trial court. *Gray v. State*, 277 Ark. 442, 642 S.W.2d 306 (1982), clarifying *Osbourne v. State*, 276 Ark. 479, 637 S.W.2d 535 (1982).

Appeals from Denial of Rule 37 Petitions.

A circuit court order denying a Rule 37

appeal must be mailed to the prisoner. Rule 37.3(d). If this is not done, a belated appeal under Rule 36.9 from the denial will lie. *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985). If there is no record showing that a copy was mailed to the prisoner, it devolves on the state to prove that the prisoner was notified that the petition had been denied.

Ordinarily, the failure of counsel to perfect an appeal where defendant wants one constitutes ineffective assistance of counsel, but defendants may, of course, waive appeal rights. *Sharp v. State*, 279 Ark. 244, 650 S.W.2d 565 (1983); *Munn v. State*, 278 Ark. 283, 644 S.W.2d 945 (1983).

Proof of ignorance of appellate procedure does not establish good cause for granting a belated appeal. *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983); *Peterson v. State*, 289 Ark. 452, 711 S.W.2d 830 (1986).

RESEARCH REFERENCES

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In General.

A request for a belated appeal under this rule should initially be addressed to the Supreme Court, because a trial judge has no authority to grant a motion for an appeal after the expiration of 30 days from entry of judgment. *Hammon v. State*, 270 Ark. 307, 605 S.W.2d 6 (1980).

All litigants, including those who proceed pro se, must bear responsibility for conforming to the rules of procedure or demonstrating a good cause for not doing so. *Bragg v. State*, 297 Ark. 348, 760 S.W.2d 878 (1988).

Where petitioner offered no explanation for his failure to contact the court reporter, his reliance on a fellow inmate for legal advice did not excuse him from following proper procedure. *Bragg v. State*, 297 Ark. 348, 760 S.W.2d 878 (1988).

Procedural defaults do not always bar consideration of the merits of a federal claim by a

habeas court, even when cause and prejudice have not been shown. But in order to qualify for such extraordinary treatment, petitioner must show that a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Ellis v. Lockhart*, 875 F.2d 200 (8th Cir. 1989).

Where there was justifiable confusion about whether Supreme Court's decision in *Kelly v. Kelly*, 310 Ark. 244, 835 S.W.2d 869 (1992), which was civil in nature, applied to criminal appeals, the court treated defendant's motion for a rule on the clerk, for refusing to docket defendant's appeal as untimely, as one for belated appeal pursuant to this rule. *Tucker v. State*, 311 Ark. 446, 844 S.W.2d 335 (1993).

In a per curiam opinion delivered on January 21, 1994, the Supreme Court amended its rules of criminal procedure to clarify that, if a post-trial motion in the nature of a motion for a new trial or amendment of judgment is not resolved by the trial court within thirty days from the date of its filing, it was deemed denied under former ARAP 4(c); the court subsequently readopted that rule and made it a part of this rule, which superseded former ARCrP 36.9. *Harris v. State*, 327 Ark. 14, 935 S.W.2d 568 (1997).

Construction.

The jurisdictional consequences for failing to timely file a motion for a new trial should mirror those which result from failing to timely file a notice of appeal, since the limitations period of § 16-91-105(b)(1) and ARCrP 36.22 [now ARCrP 33.3] is specifically defined by reference to that set forth in ARCrP 36.9(a) [see now this rule]; accordingly, compliance with the thirty-day filing period contemplated by § 16-91-105(1) and ARCrP 36.22 is not a jurisdictional prerequisite to the state court's consideration of a motion for a new trial based upon newly discovered evidence. *Perry v. Norris*, 879 F. Supp. 1503 (E.D. Ark. 1995), *aff'd* 107 F.3d 665 (8th Cir. 1997).

Where trial court granted defendant's motion for Ark. R. Crim. P. 37 relief, but had not yet amended the judgment, applying subdivision (b)(1) of this rule, defendant's notice of appeal had to be treated as filed one day after the entry of the amended judgment and commitment order and was effective to appeal that judgment. *Hill v. State*, 89 Ark. App. 126, 206 S.W.3d 300 (2005), reversed 363 Ark. 505, 215 S.W.3d 586 (2005).

Authority of Trial Court.

The trial court cannot dismiss an appeal without stipulation by the parties or a motion by the appellant; in all other cases, it must be the appellate court that decides whether notice of appeal is proper. *Stahl v. State*, 328 Ark. 106, 940 S.W.2d 880 (1997).

The trial court exceeded its authority in

striking a notice of appeal. *Stahl v. State*, 328 Ark. 106, 940 S.W.2d 880 (1997).

Belated Appeal.

Prisoner's pro se petition to file a belated appeal under subsection (e) of this rule from the circuit court's denial of his petition for postconviction relief was denied because the prisoner's allegation that he mailed the notice of appeal prior to the expiration of the 30-day filing period set forth in Ark. R. App. P. Civ. 4(a) did not establish good cause for his failure to file his notice of appeal with the circuit court in a timely manner. *Smith v. State*, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 93 (Feb. 14, 2008).

Belated appeal in accordance with subsection (e) of this rule was not allowed because petitioner stated no good cause for the failure to comply with proper procedure. *Smith v. State*, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 133 (Feb. 28, 2008).

Where petitioner filed a motion to proceed with a belated appeal pursuant to subsection (e) of this rule, the state supreme court could not decide the case without a remand to the trial court for additional findings; there nothing in the record to show that petitioner requested that the public defender file an appeal within the required time period. *M.H. v. State*, 373 Ark. 112, 281 S.W.3d 747 (2008).

Belated appeal from the denial of postconviction relief could not be considered under the exceptions in subsection (e) of this rule because petitioner inmate failed to make a showing of good reason for his failure to follow the rules of procedure. The inmate's claim that he was so impaired by medications that he could not follow the procedural rules was rejected as inconsistent with his claim that he was sufficiently well to file the notice of appeal. *Daniels v. State*, 2009 Ark. 607, — S.W.3d —, 2009 Ark. LEXIS 802 (2009).

Belated appeal from the denial of postconviction relief could not be considered under the exceptions in subsection (e) of this rule when petitioner inmate did not provide a reason as to his failure to file the notice of appeal because he averred that he timely filed the notice. *Daniels v. State*, 2009 Ark. 607, — S.W.3d —, 2009 Ark. LEXIS 802 (2009).

—In General.

The Supreme Court will grant a belated appeal under this rule if the clerk neglects to comply with ARCrP 37.3(d). *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985).

It is possible for a defendant to correct his failure to file a timely appeal by seeking permission, via an application and affidavit, to file a belated appeal under subsection (e) of this rule. *Harris v. State*, 327 Ark. 14, 935 S.W.2d 568 (1997).

A defendant was entitled to a belated appeal where she informed her attorney on the

day the judgment was entered against her that she desired to appeal and was informed that he would not appeal the judgment because she was unable "to meet the price quoted." *Langston v. State*, 341 Ark. 739, 19 S.W.3d 619 (2000).

At the time the state filed its motion to dismiss defendant's appeal, defendant's time to file a belated appeal under subsection (e) of this rule had not yet expired; in light of defendant's right to appeal under Ark. R. App. P. Crim. 1, the court extended the time for the filing of the state's brief and held in abeyance the state's motion to dismiss. *Valenzuela v. State*, 357 Ark. 89, 160 S.W.3d 345 (2004).

—Attorney Error.

Where counsel assumes responsibility for the error in the untimely filing of the defendant's transcript in a criminal case, a motion for a rule on the clerk is granted routinely. *Winkle v. State*, 308 Ark. 612, 823 S.W.2d 912 (1992).

Where the record was tendered late due to a mistake admittedly made by the attorney for a criminal defendant, good cause is shown to grant the motion. *Austin v. State*, 309 Ark. 145, 825 S.W.2d 608 (1992); *Moffitt v. State*, 309 Ark. 282, 828 S.W.2d 356 (1992); *Clay v. State*, 309 Ark. 486, 828 S.W.2d 846 (1992).

Under authority of this rule, the Arkansas Supreme Court grants belated appeals because of attorney's errors, but those are granted before the case has been submitted to an appellate court; where no good reason has been shown by the time the case is submitted, the appeal is dismissed with prejudice. *Pannell v. State*, 320 Ark. 390, 897 S.W.2d 552 (1995).

Criminal defense attorney's admission of responsibility for filing the notice of appeal prematurely was good cause to grant the motion for belated appeal. *Brown v. State*, 321 Ark. 282, 900 S.W.2d 954 (1995).

Defendant's motion for a belated appeal was denied because the appeal was not filed within 30 days of the date defendant's motion for a new trial was overruled by operation of law and defendant's attorney did not accept responsibility for the late filing; however, the motion would be granted if defendant's attorney filed a motion and affidavit within 30 days accepting responsibility. *Jones v. State*, 353 Ark. 121, 111 S.W.3d 853 (2003), criticized *McDonald v. State*, 146 S.W.3d 883 (2004); *Valenzuela v. State*, 353 Ark. 124, 110 S.W.3d 758 (2003).

Supreme Court of Arkansas refused to reconsider its holding in *Tarry v. State*, 57, S.W.3d 163 (2001), that defendant would be allowed to proceed with a late appeal of his conviction only if defendant's counsel admitted fault in failing to file the record in a timely fashion; regulation of the practice of law in state courts was a matter within the author-

ity of the Supreme Court of Arkansas and the Court was not required to suspend its rules and procedures because a federal tribunal challenged the Court's authority sua sponte. *Tarry v. State*, 353 Ark. 158, 114 S.W.3d 161 (2003).

Where a defense attorney failed to timely file the notice of appeal of the judgment denying defendant's pretrial motion to suppress evidence, the court ordered her to file a motion and affidavit accepting full responsibility; thus, when the defense attorney failed to comply with the court order and filed an unsuccessful motion for reconsideration instead, she was ordered to appear before the court to show cause why she should not be held in contempt. *McDonald v. State*, 354 Ark. 28, 124 S.W.3d 438 (2003).

Attorney is no longer required to file an affidavit admitting fault before a motion for relief for an untimely appeal is considered; however, the attorney should candidly admit fault in order to expedite a client's appeal and, upon either an admission or a finding of fault by the Arkansas Supreme Court, a copy of the opinion will be forwarded to the Arkansas Supreme Court's Committee on Professional Conduct. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004).

Appellate court granted a motion for a belated appeal from a rape case because a trial court determined that defendant had asked the original attorneys in the case to file a timely notice of appeal immediately after the judgment of conviction was entered. *Kuelper v. State*, 356 Ark. 370, 150 S.W.3d 282 (2004).

Where defendant's attorney clearly erred by failing to timely file defendant's appeal within 30 days of defendant's conviction, the State Supreme Court granted defendant's motion to file a belated appeal. *King v. State*, 359 Ark. 274, 196 S.W.3d 486 (2004).

Where defendant's appellate counsel candidly admitted that his failure to file a timely notice of appeal from the judgments entered against defendant prevented defendant from having his convictions reviewed by the Arkansas Supreme Court and the motion for belated appeal was made within 18 months of the date of the entry of judgment, in accordance with subsection (e) of this rule, the Court granted the motion. *Avery v. State*, 361 Ark. 352, 206 S.W.3d 828 (2005).

Appellate court directed a clerk to accept defendant's appeal even though it was filed beyond the 30-day time period required in this rule where the attorney stated in her motion for rule on the clerk that defendant was not at fault for the appeal not being timely filed. *Smith v. State*, 363 Ark. 576, 215 S.W.3d 588 (2005).

Where defendant's attorney filed a notice of appeal following the denial of his motion to

suppress, but did not file an appeal of the order of conditional plea entered a month later, the Court granted defendant's motion to file a belated appeal as defendant was not at fault for the attorney's error. *Williams v. State*, 366 Ark. 583, 237 S.W.3d 93 (2006).

Defendant's motion for a belated appeal was granted where his appeal was not timely filed as defendant's counsel took full responsibility for the untimely filing of the notice of appeal and requested the case to proceed in the usual manner. *Joshua v. State*, 367 Ark. 233, 238 S.W.3d 933 (2006).

Where an attorney admitted full responsibility for an untimely notice of appeal, defendant's motion for rule on the clerk was treated as a motion for a belated appeal and was granted. *Thompson v. State*, 367 Ark. 372, 240 S.W.3d 99 (2006).

—Cause.

Where it was apparent that defendant did not learn he may have been entitled to appointed counsel on appeal until it was too late to perfect his appeal under the Rules of Criminal Procedure, and it was likewise clear that so far as defendant was concerned he had a good reason for not filing the notice in the time required, in that he was without money, had no knowledge of his rights, and was physically in the hospital when time for notice expired, he was entitled to a belated appeal. *Finnie v. State*, 265 Ark. 941, 582 S.W.2d 19 (1979).

To be entitled to a belated appeal, an appellant must show good cause for failure to file a timely notice of appeal and where appellant gave no reason for failing to forward his notice of appeal to the clerk of the circuit court, nor did he allege that the notice was received by the circuit court judge, to whom he claimed to have mailed it, within the 30 days for filing a notice of appeal and, even if it were received by the circuit judge, the rules of appellate procedure required that the notice of appeal be filed with the circuit clerk, there was no cause to grant belated appeal; mere ignorance of appellate procedure alone is not good cause for granting a belated appeal. *Thompson v. State*, 280 Ark. 163, 655 S.W.2d 424 (1983).

—Ineffective Assistance of Counsel.

Where the petitioner's counsel had not been fully paid for his services, had advised the petitioner of his right to appeal and sent the necessary papers to the petitioner, which the petitioner failed to use, the petitioner was not denied effective assistance of counsel and was not entitled to a belated appeal. *Houston v. State*, 263 Ark. 607, 566 S.W.2d 403 (1978).

Where the defendant's trial counsel filed a notice of appeal, but then failed to file the transcript and the record with the appellate court, the defendant's motion for a belated appeal was properly granted by the trial court

because the trial attorney had apparently abandoned his client and left him without an appeal being perfected, even though no good reason was shown by the trial counsel for his failure to perfect the appeal. *Osbourne v. State*, 276 Ark. 479, 637 S.W.2d 535 (1982).

Where attorney did not follow the procedure prescribed for withdrawal from a case, he would still be considered the attorney of record and would be held responsible for the duties imposed upon him by law, and where the attorney made a mistake in not timely filing an appeal, his client's motion for a belated appeal would be granted. *Ellis v. State*, 276 Ark. 560, 637 S.W.2d 588 (1982).

Where the evidence showed that the defendant wrote to his attorney several times within the 30-day period during which an appeal could have been initiated asking his attorney to appeal from the decision revoking his suspended sentence, but the attorney never perfected the appeal nor sought permission from the trial court to withdraw from the case, the defendant's pro se motion for a belated appeal would be granted, and since his attorney remained the attorney of record, the attorney would be held responsible for the duties on appeal imposed upon him by law. *Blakely v. State*, 279 Ark. 141, 649 S.W.2d 187 (1983).

The failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel and constitutes good cause for granting a belated appeal. *Blakely v. State*, 279 Ark. 141, 649 S.W.2d 187 (1983).

Where defendant claims that his attorney failed to appeal when requested to do so, he was entitled at most to a belated appeal, and ARCP 37 is not a means of bypassing a motion for belated appeal. *Lomax v. State*, 285 Ark. 440, 688 S.W.2d 283 (1985).

The failure of counsel to perfect an appeal in a criminal case where the defendant desires an appeal amounts to a denial of the defendant's right to effective assistance of counsel. *Conley v. State*, 286 Ark. 388, 691 S.W.2d 868 (1985); *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986); *Woodruff v. State*, 323 Ark. 448, 916 S.W.2d 104 (1996).

—Motion.

Where notice of appeal was given but no record was filed and there were important questions of fact to be decided before the court could say there was good reason for the failure to file such record, a request for belated appeal would be denied without prejudice pending the appellant's applying for a hearing on the question of waiver or filing a record. *Schuster v. State*, 261 Ark. 730, 551 S.W.2d 210 (1977).

Where the motion for a belated appeal was not filed until more than 25 months from the

date of appellant's commitment and appellant waited more than nine months after the 1978 amendment of this rule before filing his motion for a belated appeal, appellant's motion for a belated appeal was not timely made and, therefore, was denied. *Hammon v. State*, 270 Ark. 307, 605 S.W.2d 6 (1980).

Although appeal was dismissed because no effective notice of appeal was filed, attorney could not subsequently file a motion for a belated appeal claiming attorney errors, because motions under this rule are granted before the case has been submitted to an appellate court, not after. *Smith v. State*, 320 Ark. 658, 898 S.W.2d 468 (1995), appeal denied 928 S.W.2d 799 (1996).

Where the appellant timely filed a motion for belated appeal, but failed to file an affidavit in support of his motion, the motion would be denied and the appellant would be directed to submit the required affidavit, demonstrating good reason for failing to timely file the notice of appeal, within 30 days of the date of the court's opinion. *Slack v. State*, 338 Ark. 512, 999 S.W.2d 667 (1999).

—Timeliness.

The defendant failed to file a motion for a belated appeal in a timely manner where he did not provide the certified copy of the trial court order until 19 months after the order was entered. *Hayes v. State*, 328 Ark. 95, 940 S.W.2d 886 (1997).

A motion for belated appeal was untimely where the trial court was deemed to have denied the defendant's post-trial motion for new trial on November 15, 1995, where the motion for belated appeal was not filed until May 18, 1999, some two years after the time for filing such motion had expired. *Harris v. State*, 338 Ark. 330, 993 S.W.2d 480 (1999).

Although the rule provides that a motion for belated appeal must be filed within 18 months of the date sentence was pronounced in those cases where the judgment was not entered within 10 days of the pronouncement of sentence, the court agreed to consider a motion for belated appeal because the defendant's attorney had filed a notice of appeal and an appeal bond had been set, under such circumstances, the defendant might well have believed that the appeal was ongoing. *Ragsdale v. State*, 341 Ark. 744, 19 S.W.3d 622 (2000).

The 90-day period allowed by Ark. R. App. P. Civ. 5(a) for filing the record on appeal regarding defendant's conviction of a misdemeanor offense began to run on the effective date of defendant's original notice of appeal, which was the date following the trial court's denial of defendant's posttrial motion, and not the date on which defendant filed a second notice of appeal, which served only to amend the first notice by including the denial of the motion as one of the issues being appealed;

thus, defendant's counsel was given 30 days to accept full responsibility for the late filing or defendant's motion for a rule on the clerk to allow a late filing of the record would be denied. *Smith v. State*, 351 Ark. 325, 97 S.W.3d 380 (2002).

Attorney's motion for belated appeal was denied where the attorney tendered the client's motion for belated appeal some three years after the order was entered, and three years after he filed a notice of appeal; the attorney did not act with diligence and, thus, waived the right to appeal from the order. *Efurd v. State*, 352 Ark. 476, 101 S.W.3d 800 (2003).

Dismissal.

Where counsel gave notice to the circuit court before the appeal was docketed in the Supreme Court that appellant had elected to discontinue the appeal, the notice was accompanied by a statement signed by appellant verifying that he had made the decision to drop the appeal, and the court subsequently entered an order dismissing the appeal, counsel followed proper procedure to dismiss the postconviction appeal, and appellant did not show good cause to allow its reinstatement. *Noggle v. State*, 332 Ark. 79, 962 S.W.2d 368 (1998).

Jurisdiction.

The filing of a notice of appeal within the 30-day limit in a criminal case is not a jurisdictional prerequisite under this rule. *Goodwin v. State*, 261 Ark. 926, 552 S.W.2d 233 (1977).

Compliance with the eighteen-month limitations period under subsection (e) of this rule was intended to be viewed as a jurisdictional prerequisite. *Perry v. Norris*, 879 F. Supp. 1503 (E.D. Ark. 1995), *aff'd* 107 F.3d 665 (8th Cir. 1997).

The timely filing of a notice of appeal is jurisdictional. *Henry v. State*, 49 Ark. App. 16, 894 S.W.2d 610 (1995).

Appellate court did not have jurisdiction to entertain defendant's challenge to a DNA sample that was taken after he was convicted; defendant failed to file an amended notice of appeal after the trial court denied his post-trial motion to correct. *Davis v. State*, 94 Ark. App. 240, 228 S.W.3d 529 (2006).

Notice of Appeal.

A notice of appeal is ineffective when it is entered prior to the date of entry of the original judgment. *Pannell v. State*, 320 Ark. 390, 897 S.W.2d 552 (1995).

Although defendant did not file a second notice of appeal when his new-trial motion was deemed denied or obtain a hearing on that motion, his notice of appeal filed before his new-trial motion was effective to appeal the judgment. *Smith v. State*, 329 Ark. 238, 947 S.W.2d 373 (1997).

Subsection (b) of this rule provided that a premature notice of appeal was to be treated as if it had been filed after entry of the judgment, decree, or order; the premature filing benefit was afforded to the state as well, otherwise the benefit would be granted to all parties except the state. *Fountain v. State*, 348 Ark. 359, 72 S.W.3d 511 (2002).

If the issue of failure to perfect an appeal involves a notice of appeal, then relief must be sought under this rule. *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004).

Where defendant failed to renew his notice of appeal after the trial court failed to rule on his motion for reconsideration, none of the arguments raised in defendant's motion for reconsideration were preserved for review; however, notwithstanding defendant's failure to preserve the arguments in the motion for reconsideration, the appellate court could still consider the issue of the right to a jury trial on appeal. *Ayala v. State*, 365 Ark. 192, 226 S.W.3d 766 (2006).

On February 2, 2007, defendant filed a motion to dismiss the rape charge pending against him for denial of a speedy trial, a motion to dismiss due to double jeopardy, and an objection to the circuit court's declaration of a mistrial; while defendant filed a notice of appeal on February 12, 2007, the circuit court did not enter a written order denying his motions until March 29, 2007. According to subdivision (b)(1) of this rule, the notice of appeal was treated as filed on the day after the judgment was entered. *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007).

Pursuant to Ark. Sup. Ct. R. 6-9(b)(2), the father's notice of appeal of an order terminating his parental rights was required to be filed no later than May 5, 2008, but it was not filed until the next day. Because the father's motion to file a belated notice of appeal was filed well within the 18 months of the date of the entry of judgment as prescribed by subsection (e) of this rule, and the father's attorney candidly admitted fault, the court granted the motion. *Garcia v. Ark. HHS*, 374 Ark. 144, 286 S.W.3d 674 (2008).

Notice of appeal, that recited the convictions challenged but omitted a case number for the intimidating a witness charge, met the requirements of subsection (a) of this rule; omission of the case number was merely a scrivener's error. *Hayes v. State*, 2011 Ark. App. 99, — S.W.3d —, 2011 Ark. App. LEXIS 98 (Feb. 2, 2011).

Notification of Parties.

When the record was silent on whether the clerk complied with the rule and the Attorney General in his response to a motion for belated appeal was unable to provide the clerk's affidavit or some other proof that the order was mailed, it would be assumed that the petitioner was not notified of the denial of his

petition; in petitioner's case, there was no notation on the docket that he was notified by letter or otherwise that he had been denied relief and the Attorney General did not produce any proof to negate the conclusion that no one gave notice to the petitioner in time for him to file a timely notice of appeal, and he was therefore entitled to a belated appeal. *Porter v. State*, 287 Ark. 359, 698 S.W.2d 801 (1985).

Pro Se Appellant.

Lack of familiarity with legal procedure on the part of a pro se appellant did not excuse his failure to file a timely notice of appeal. *Strawbridge v. State*, 327 Ark. 679, 940 S.W.2d 477 (1997).

Time for Appeal.

Defendant's appeal from his alleged illegal sentence was improper where defendant referred to the judgment and commitment order filed on March 1, 2002, that reflected his being sentenced to an eight-year sentence on a Class B felony; however, defendant never appealed to the court from his March 1999 order and, thus, did not comply with the 30-day time frame within which to raise an appeal under subdivision (a)(1) of this rule, nor did he ever file a posttrial motion challenging the classification of the felony in the judgment and disposition order. *Timmons v. State*, 81 Ark. App. 219, 100 S.W.3d 52 (2003).

Defendant's motion to file a belated appeal was granted where although a notice of appeal was filed by defendant's attorney, he failed to appeal from the judgment as required under Ark. R. Crim. P. 24.3; defendant was not at fault for counsel's failure to file a timely notice of appeal and he showed good cause for the motion to be granted. *Lawson v. State*, 367 Ark. 235, 238 S.W.3d 931 (2006).

Although the state's brief presented an important issue to the correct and uniform administration of the criminal law and upon which the court could hear an appeal pursuant to Ark. R. App. P. Crim. 3, the state's direct appeal was not timely under subsection (e) of this rule because the notice of appeal was not filed within 30 days of a written order; the court treated the appeal as if it were brought up on petition for writ of certiorari. *State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008).

Motion for belated appeal is a remedy that is available to a party in a situation where there has been a failure to follow the ordinary appellate review procedure. Subsection (e) of this rule allows a party to seek a belated appeal where either error or good cause prevented an appeal from moving forward in the ordinary appellate review procedure. *Dodson v. Norris*, 374 Ark. 501, 288 S.W.3d 662 (2008).

Defendant's notice of appeal was not timely filed within thirty days as to the February 14,

2008, order, but was timely filed within thirty days as to the February 29, 2008, order; however, the timely notice of appeal failed to sufficiently identify the order entered on February 29, 2008, as the order from which the appeal was taken, and the supreme court thus had no jurisdiction over the matter as the result of a defective notice of appeal. *Smith v. State*, 2009 Ark. 85, — S.W.3d —, 2009 Ark. LEXIS 49 (2009).

Time for Filing.

Where the defendant stated that after trial he was undecided about whether to appeal, and he admitted that by the time he wrote his attorney, it was too late to file a notice of appeal, the defendant was not entitled to file a belated appeal since he provided no good cause for his failure to contact the attorney within the time set for filing a notice of appeal. *Munn v. State*, 278 Ark. 283, 644 S.W.2d 945 (1983).

A belated appeal, in criminal cases, may be granted when a good reason for failing to perfect the appeal is shown by affidavit, but there is no rule that gives the circuit court authority to accept untimely appeals. *Edwards v. City of Conway*, 300 Ark. 135, 777 S.W.2d 583 (1989).

Where a motion for a rule on the clerk was not accompanied by a proper affidavit as required by this Rule, the motion for a rule on the clerk was denied without prejudice; it is the attorney's responsibility to see that the record and transcript are timely filed. *Neighbors v. State*, 304 Ark. 297, 800 S.W.2d 438 (1990).

A motion to modify an amended sentence is a motion made for post-conviction relief; such a motion would not extend the time for filing a notice of appeal under this rule. *Hadley v. State*, 321 Ark. 499, 902 S.W.2d 231 (1995).

As the 30th day from the judgment fell on a Sunday, the time to file an appeal extended to the next day, Monday. *Bowen v. State*, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

A notice of appeal filed prior to the disposition of a post-trial motion has no effect, and a new notice of appeal must be filed within the prescribed time dated from the entry of the order dealing with the post-trial motion or from the expiration of the 30 days allowed in the absence of a ruling. *Henry v. State*, 49 Ark. App. 16, 894 S.W.2d 610 (1995).

Where notice of appeal was filed more than 30 days after judgment was entered, the notice of appeal was of no effect. *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996).

Where defendant's new trial motion was filed on October 16, 1995, under this rule the motion was deemed denied thirty days later, on November 15, 1995, and, accordingly, defendant had thirty days within which to file

his appeal which date ended on December 15, 1995; although the trial court belatedly denied defendant's new trial motion on December 5, 1995, it had no jurisdiction to do so. *Harris v. State*, 327 Ark. 14, 935 S.W.2d 568 (1997).

Appellant's notice of appeal of the order denying the motion for a new trial was not timely filed within the thirty-day time period. *Rains v. State*, 329 Ark. 607, 953 S.W.2d 48 (1997).

Although defendant filed his motion for a new trial five days before his original conviction was entered, his notice of appeal was timely filed, because he had thirty additional days from the trial court's denial of his new trial motion to file his notice of appeal. *McIntosh v. State*, 340 Ark. 34, 8 S.W.3d 506 (2000).

Defendant's motion for rule on the clerk was denied where his attorney failed to file the motion in association with an attorney licensed in Arkansas; the filing of the record in the case was deemed untimely because it was filed by a person who was not admitted to practice in Arkansas. *McKenzie v. State*, 354 Ark. 479, 125 S.W.3d 173 (2003).

Defendant's failure to file a timely notice of appeal challenging an illegal sentence to both probation and a suspended sentence did not preclude review of the sentence following the subsequent revocation of defendant's sentence because a claim of an illegal sentence could be raised at any time. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003).

Where an appeal involved the docketing of the record rather than the filing of a notice of appeal, the 18-month time limit under this rule did not apply. *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004).

Where 31 days after defendant's motion for a new trial was deemed denied defendant filed a second notice of appeal from his judgment of conviction, his failure to timely file an amended notice of appeal, as required by subdivision (b)(2) of this rule, meant that his appeal of the denial of his motion for a new trial was not properly before the court because the time period in Ark. R. Crim. P. 33.3(c) is mandatory. *Wright v. State*, 359 Ark. 418, 198 S.W.3d 537 (2004).

Where defendants' post-trial motions to set aside their guilty pleas were denied on February 14, 2003, pursuant to Ark. R. Crim. P. 33.3(c) and subdivision (b)(1) of this rule, defendants had to file their notice of appeal within thirty days; thus, defendants' notice of appeal, filed on October 7, 2003, was untimely and their appeal was dismissed for lack of jurisdiction. *Hiang v. State*, 89 Ark. App. 285, 202 S.W.3d 550 (2005).

Where appellant filed his notice of interlocutory appeal of the decision denying his motion for juvenile transfer on September 9, 2005, but the trial court did not enter its order

denying his motion until on September 19, 2005, the reviewing court treated the notice of interlocutory appeal as being filed the day after the entered order denying transfer. *Barton v. State*, 366 Ark. 339, 235 S.W.3d 511 (2006).

Defendant's notice of appeal was filed within 30 days of the filing of his post-trial motion for a new trial on which the trial court made no ruling, and it sufficiently identified the trial court's deemed denial of his post-trial motion; therefore, he was in compliance with subdivision (b)(1) of this rule, and no amended notice was required. *McBride v. State*, 99 Ark. App. 146, 257 S.W.3d 914 (2007).

Transcript.

An attorney is not required to order the transcribed record at his own expense. *Houston v. State*, 263 Ark. 607, 566 S.W.2d 403 (1978).

A belated appeal may be granted for good cause even if no notice of appeal was filed. *Conley v. State*, 286 Ark. 388, 691 S.W.2d 868 (1985).

If the clerk of the court fails to mail the order denying the petition for postconviction relief to the petitioner, the Supreme Court will grant a belated appeal in accordance with this rule but the burden is on the petitioner to establish the clerk's failure to comply with the rule. *Pennington v. State*, 286 Ark. 503, 697 S.W.2d 85 (1985).

Tender of the record was timely, because the petitioner's notice of appeal was deemed filed on November 23, 2011, and the tender of the record on February 8, 2012, seventy-seven days after that date, was therefore timely; in circumstances such as were present in the instant case, where the request for a ruling on the omitted issue was still pending when the petitioner filed his notice of appeal, the notice of appeal was deemed filed on the day after the order disposing of the request for a ruling was entered; petitioner's motion for rule on clerk was granted. *Lewis v. State*, 2012 Ark. 355, — S.W.3d —, 2012 Ark. LEXIS 267 (May 31, 2012).

Waiver.

Where after filing a timely notice of appeal from his conviction of second-degree murder the defendant left the State, and, although his defense counsel made several attempts to contact him to inform him of his right to have the record prepared at public expense, the defendant did not respond to his attorney's

telephone calls or letters, the defendant's total failure to take any action to pursue the appeal effectively waived his right to appeal, and therefore, he was not entitled to a belated appeal. *Sharp v. State*, 279 Ark. 244, 650 S.W.2d 565 (1983).

Where the defendant did not inform counsel of his desire to appeal until the time for filing a notice of appeal had passed, the defendant waived his right to appeal. *Robbins v. State*, 288 Ark. 311, 705 S.W.2d 6 (1986).

An attorney is not required to perfect an appeal when the defendant who is aware of his appeal right stands silent. *Davis v. State*, 293 Ark. 203, 736 S.W.2d 281 (1987).

Where an individual failed to specifically appeal the trial court's denial of his motion for expungement, the individual's arguments on appeal that related to the denial of that motion were waived. *Barnett v. State*, 366 Ark. 427, 236 S.W.3d 491 (2006).

Defendant's motion to file a belated appeal was denied where the circuit court found that the attorney had advised defendant of his right to appeal and defendant indicated that he did not want to appeal. *Peters v. State*, 369 Ark. 421, 255 S.W.3d 476 (2007).

Writ of Coram Nobis.

Appellant's motion for reconsideration filed after a denial of a writ of error coram nobis did not operate to extend the time for filing a notice of appeal. The deemed-denied provision of Ark. R. Crim. P. 33.3 did not apply to appellant's postconviction proceeding, rendering appellant's notice of appeal untimely under subdivision (a)(3) of this rule. *McJames v. State*, 2010 Ark. 74, — S.W.3d —, 2010 Ark. LEXIS 104 (Feb. 18, 2010).

Cited: *Morrissey v. State*, 323 Ark. 803, 917 S.W.2d 167 (1996); *Dodson v. State*, 326 Ark. 637, 934 S.W.2d 198 (1996); *Chavis v. State*, 328 Ark. 251, 942 S.W.2d 853 (1997); *Thomas v. State*, 345 Ark. 236, 45 S.W.3d 818 (2001); *Houff v. State*, 345 Ark. 287, 45 S.W.3d 386 (2001); *Wright v. Norris*, 299 F.3d 926 (8th Cir. 2002); *Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003); *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003); *McDonald v. State*, 354 Ark. 680, 124 S.W.3d 438 (2003); *Watts v. Norris*, 356 F.3d 937 (8th Cir. 2004), cert. denied 543 U.S. 904, 125 S. Ct. 201, 160 L. Ed. 2d 177 (2004); *Jones v. State*, 367 Ark. 476, 241 S.W.3d 268 (2006); *Stone v. State*, 367 Ark. 614, 242 S.W.3d 223 (2006); *Crossno v. State*, 369 Ark. 272, 253 S.W.3d 462 (2007); *Richie v. State*, 374 Ark. 158, 286 S.W.3d 681 (2008).

Rule 3. Appeal by state.

(a) An interlocutory appeal on behalf of the state may be taken only from a pretrial order in a felony prosecution which (1) grants a motion under Ark.

R. Crim. P. 16.2 to suppress seized evidence, (2) suppresses a defendant's confession, or grants a motion under Ark. Code Ann. § 16-42-101(c) to allow evidence of the victim's prior sexual conduct. The prosecuting attorney shall file, within ten (10) days after the entering of the order, a notice of appeal together with a certificate that he appeal is not taken for the purposes of delay and that the order substantially prejudices the prosecution of the case. Further proceedings in the trial court shall be stayed pending determination of the appeal.

(b) Where an appeal, other than an interlocutory appeal, is desired on behalf of the state following either a misdemeanor or felony prosecution, the prosecuting attorney shall file a notice of appeal within thirty (30) days after entry of a final order by the trial judge.

(c) When a notice of appeal is filed pursuant to either subsection (a) or (b) of this rule, the clerk of the court in which the prosecution sought to be appealed took place shall immediately cause a transcript of the trial record to be made and transmitted to the attorney general, or delivered to the prosecuting attorney, to be by him delivered to the attorney general. If the attorney general, on inspecting the trial record, is satisfied that error has been committed to the prejudice of the state, and that review by the Supreme Court is desirable under this rule, he may take the appeal by filing the transcript of the trial record with the clerk of the Supreme Court within sixty (60) days after the filing of the notice of appeal.

(d) The Supreme Court will not consider an appeal filed under either subsection (a)(1) or (2) or subsection (b) of this rule unless the correct and uniform administration of the criminal law requires review by the court.

(e) A decision by the Arkansas Supreme Court sustaining in its entirety an order appealed under subsections (a)(1) and (a)(2) shall bar further proceedings against the defendant on the charge; however, a decision sustaining an order appealed under subsection (a)(3) shall not bar further proceedings against the defendant on the charge. (Amended June 7, 1976, effective July 7, 1976; amended February 14, 1983; adopted and amended July 10, 1995, effective January 1, 1996; amended December 3, 1998; amended February 17, 2000, effective retroactively to December 3, 1998; amended February 9, 2011, effective April 1, 2011.)

Reporter's Notes to Rule 3 (1995): This rule is former ARCrP 36.10.

Court's Comment to February 1983

Amendment: Paragraph (a) of this Rule, as amended, in conjunction with paragraph (d), limits interlocutory appeals by the state to the two specified situations and contemplates that the suppressed evidence or confession must be essential to the prosecution of the case.

Addition to Reporter's Notes, 1998

Amendment: "(a)(3)" was added to the issues from which the state may file an interlocutory appeal — an adverse ruling under the Rape Shield Law, Ark. Code Ann. § 16-42-101. This appeal is currently authorized by statute, and it is now referenced in the rule to avoid any confusion.

Addition to Reporter's Notes, 2000

Amendment: Subsection (d) was amended to

clarify that the rule is consistent with Ark. Code Ann. § 16-42-101(c)(3)(C) to the effect that a decision by the Supreme Court sustaining an order appealed under subsection (a)(3) (victim's prior sexual conduct) does not bar further proceedings against the defendant. The 1998 amendment adding subsection (a)(3) created a possible inconsistency between the rule and the Rape Shield Statute which was not intended. Accordingly, this clarifying amendment is effective retroactively to the time of the prior amendment, December 3, 1998.

Addition to Reporter's Notes, 2011

Amendment: The 2011 amendment added subsection (d) of the rule to make clear that the "correct and uniform administration of the criminal law" requirement applies only to appeals permitted under subsections (a)(1), (a)(2), and (b) of this rule. Compare *State v.*

Parker, 2010 Ark. 173, where the court refused to apply the requirement to an interloc-

utory appeal under Ark. Code Ann. § 16-42-101(c).

1987 Unofficial Supplementary Commentary to former Rule 36.10 [now RAP-Crim 3]

Interlocutory Appeals by State.

An interlocutory appeal cannot be taken after jeopardy attaches, i.e., after the jury is sworn to try the case in a jury trial or the court begins taking evidence in a bench trial. Therefore, the trial court cannot permit an interlocutory appeal in a bench trial after some evidence has been heard. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980).

Order of Suppression Versus Order Holding Evidence Inadmissible.

Not every finding of inadmissibility constitutes suppression of evidence for the purposes of this rule. See, *State v. Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981), where the Arkansas Supreme Court held that a trial court order holding inadmissible a deposition was not appealable because no evidence had been "suppressed." The new first sentence of subpart (a) specifies grounds for appeal, eliminating the need for drawing distinctions between suppressed and rejected evidence.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments: Appeal and Error: Standard of Review for Warrantless Searches and Seizures, 32 Ark. L. Rev. 825.

U. Ark. Little Rock L.J. Survey, Criminal Procedure, 13 U. Ark. Little Rock L.J. 349.

CASE NOTES

ANALYSIS

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In General.

In criminal cases involving a felony, the state may appeal after the attorney general has inspected the record and determined that the trial court has committed an error, correction of which is essential to the proper and uniform administration of the criminal laws of the state. *State v. Harvest*, 26 Ark. App. 241, 762 S.W.2d 806 (1989).

In all appeals under subsection (c) of this rule, regardless of the decision in the appellate court, the trial had below is a bar to any subsequent trial of the accused for the same offense, and only possible result of the appeal being a ruling by the appellate court on ques-

tions of law that might serve as a guide in future trials. Usually such issues involve a question as to the sufficiency of the information, the admissibility of testimony, the competency of witnesses, the correctness of instructions, or any other question, the determination of which might furnish a precedent which would be important to the correct and uniform administration of the criminal law. *State v. Harvest*, 26 Ark. App. 241, 762 S.W.2d 806 (1989).

There is a significant and inherent difference between appeals brought by criminal defendants and those brought on behalf of the state: the former is a matter of right, and to cut off a defendant's right to appeal because of his attorney's failure to follow rules would violate the Sixth Amendment right to effective assistance of counsel; the latter is not derived from the Constitution, nor is it a matter of right, but is granted pursuant to this rule. *Bowden v. State*, 326 Ark. 266, 931 S.W.2d 104 (1996).

Applicability.

This rule does not empower the state to appeal from a dismissal by a circuit court of a petition to revoke a felon's probation. Subsection (a) of this rule is inapplicable because an order dismissing or granting a petition to revoke is not a pre-trial order in a felony prosecution, and such an order is not one

granting a motion to suppress seized evidence or one suppressing a defendant's confession; subsection (b) of this rule does not apply since the appeal does not follow a misdemeanor proceeding. *State v. Hurst*, 296 Ark. 132, 752 S.W.2d 749 (1988).

The state has no authority under subsection (b) of this rule to appeal from a dismissal of a violation of a commission regulation; under state law, a "violation" is a separate category of offense from a misdemeanor or a felony. *State v. Bickerstaff*, 320 Ark. 641, 899 S.W.2d 68 (1995), overruled in part, *State v. Herndon*, 365 Ark. 185, 226 S.W.3d 771 (2006).

Appeal from the order of dismissal of a revocation petition was not granted because, under subsection (b) of this rule, the dismissal of the revocation petition was not "a felony or misdemeanor prosecution." *State v. Rice*, 329 Ark. 219, 947 S.W.2d 3 (1997).

In accordance with subsection (c) of this rule, the Supreme Court of Arkansas accepted the appeal by the state concerning the transfer of defendant's case to another county because it was narrow in scope, involved the interpretation of the law, and involved the correct and uniform administration of justice which required the appellate court to review this point. *State v. Brooks*, 360 Ark. 499, 202 S.W.3d 508 (2005).

Where the state appealed and claimed that the trial court lacked jurisdiction to grant defendant's post trial motion to correct court costs, the appellate court treated the appeal as a petition for writ of certiorari under this rule and found that, under Ark. R. Crim. P. 33.3(b), defendant's motion was filed six days after the 30-day deadline and was thus untimely. *State v. Boyette*, 362 Ark. 27, 207 S.W.3d 488 (2005).

Supreme Court of Arkansas overruled *Bickerstaff*, which held that an offense charged under the Arkansas Game and Fish Commission (AGFC) regulations amounted to a violation and not a misdemeanor; in so concluding, the Court held that the state was not allowed to appeal under this rule and, in the future, the state will henceforth have an adequate remedy on appeal. *Ark. Game & Fish Comm'n v. Herndon*, 365 Ark. 180, 226 S.W.3d 776 (2006).

State could properly appeal the dismissal of criminal charges against defendant where the dismissal was based on whether the statute of limitations had run. *State v. Hayes*, 366 Ark. 199, 234 S.W.3d 307 (2006).

Because the proceeding was civil in nature, the state did not have to comply with this rule when it appealed from a decision sealing an applicant's criminal record. *State v. Burnett*, 368 Ark. 625, 249 S.W.3d 141 (2007).

State did not have to comply with this rule in an appeal from a trial court's decision to

grant postconviction relief in a capital murder case; the case was considered civil in nature. *State v. Barrett*, 371 Ark. 91, 263 S.W.3d 542 (2007).

State's appeal from an order to seal criminal convictions, despite its criminal designation, was civil in nature and did not require satisfaction of or compliance with this rule. *State v. Tyler*, 2010 Ark. 307, — S.W.3d —, 2010 Ark. LEXIS 360 (June 24, 2010).

Contemporaneous Objections.

Where the state did not have the opportunity to object to the dismissal of a felony manslaughter charge, the contemporaneous objection rule did not bar appeal of the dismissal. *State v. Thornton*, 306 Ark. 402, 815 S.W.2d 386 (1991).

Correct and Uniform Administration.

Determining whether the statute of limitations for a particular felony had run does not involve the correct and uniform administration of criminal law. *State v. Mazur*, 312 Ark. 121, 847 S.W.2d 715 (1993).

Although the state, as it must do under subsection (c) of this rule, properly asserted in its jurisdictional statement that the correct and uniform administration of justice requires Supreme Court review, where the Supreme Court did not agree with the state that the correct and uniform administration of justice was at issue in the appeal, the appeal was dismissed. *State v. Harris*, 315 Ark. 595, 868 S.W.2d 488 (1994).

Appeal which raised an issue of the application of § 5-1-110(c), rather than its interpretation, did not involve the correct and uniform administration of the criminal law. *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995).

The interpretation of §§ 5-74-105(a)(1) and 5-74-107(b)(1) did not involve Arkansas's correct and uniform administration of the criminal law. *State v. Banks*, 322 Ark. 344, 909 S.W.2d 634 (1995).

Where the trial court erroneously weighed the credibility of the state's evidence instead of determining the sufficiency of the evidence and refused to consider an element of the alternative offense, appeal by the state was allowed. *State v. Johnson*, 326 Ark. 189, 931 S.W.2d 760 (1996).

Appeal was dismissed where the circuit court's decision required a review of unique circumstances presenting mixed questions of law and fact, meaning that the correct and uniform administration of justice was not at issue. *State v. Hart*, 329 Ark. 582, 952 S.W.2d 138 (1997).

Appeal dismissed where neither issue presented by the state involved the correct and uniform administration of justice, nor would a holding establish important precedent. *State v. Gray*, 330 Ark. 364, 955 S.W.2d 502 (1997).

The question of whether double jeopardy prohibited state prosecution of an offense, where the offense was considered in the calculation of punishment for a separate federal conviction, involved the correct and uniform administration of the criminal law. *State v. Johnson*, 330 Ark. 636, 956 S.W.2d 181 (1997).

The correct and uniform administration of justice required the court to review the state's contention that the defendant could be charged with second degree murder arising from the death of her husband, notwithstanding her contention that such charge was precluded by collateral estoppel because of her former admission to guilt to negligence in the abuse of her husband. *State v. Thompson*, 343 Ark. 135, 34 S.W.3d 33 (2000).

The state's appeal as argued in its original brief merely raised the issue of the application, not interpretation, of a statute to the facts of a case and, therefore, did not involve the correct and uniform administration of the criminal law and was not appealable by the state. *State v. McCormack*, 343 Ark. 285, 34 S.W.3d 735 (2000).

State's appeal of a decision which was identical to one ruled on in another case decided while the appeal was being briefed did not raise an issue important to the correct and uniform administration of the criminal law under subsection (c) of this rule and was dismissed. *State v. Warren*, 345 Ark. 508, 49 S.W.3d 103 (2001).

Appeal by the state from the trial court's acquittal of defendant, based on its finding that there was insufficient evidence to support a conviction of defendant for driving while intoxicated, did not meet the requirements of subsection (c) of this rule where the matter presented on appeal was not a matter of interpretation of criminal rules that had widespread ramifications. *State v. Aud*, 351 Ark. 531, 95 S.W.3d 786 (2003).

In defendant's insurance fraud case, the trial court did not engage in a statutory interpretation of § 5-2-604 but, instead, simply applied the statute to the evidence presented at trial; because the state's argument merely raised the issue of application and not the interpretation of a statutory provision, the state's appeal did not involve the correct and uniform administration of the criminal law and the argument was not a proper basis for an appeal by the state. *State v. Hagan-Sherwin*, 356 Ark. 597, 158 S.W.3d 156 (2004).

Under subdivision (a)(1) of this rule, the state was not allowed to appeal from a decision granting defendant's motion to suppress evidence in a drug case because the issue presented did not involve the correct and uniform administration of the criminal law, it required an intensive factual discussion, and it turned on witness credibility. *State v. Jones*, 369 Ark. 195, 252 S.W.3d 119 (2007).

State's appeal was dismissed where the appeal was not one requiring interpretation of Arkansas criminal rules; pursuant to this rule, a review would not have widespread ramifications on the interpretation of Arkansas criminal law. *State v. Moreno*, 371 Ark. 336, 265 S.W.3d 751 (2007).

In a search and seizure case, the state was permitted to appeal the granting of a motion to suppress evidence because the issue presented was the interpretation of Arkansas' criminal case law regarding canine sniffs. The issue was not whether the circuit court applied the law incorrectly to a particular set of facts, but whether the circuit court misinterpreted the law and then applied a flawed interpretation of the law to suppress the seized drugs in this case; therefore, the correct and uniform administration of the criminal law was implicated. *State v. Harris*, 372 Ark. 492, 277 S.W.3d 568 (2008).

Even though defendant did not raise the propriety of a state's appeal under subsection (c) of this rule, the appeal was dismissed where the state did not present a proper issue for appeal when it claimed that a trial court erred in granting a new trial because there was no issue that concerned the correct and uniform administration of justice where the trial court's ruling turned on whether a bailiff, in fact, answered a juror's question. *State v. Short*, 2009 Ark. 630, 361 S.W.3d 257 (2009).

Arkansas Supreme Court accepted the state's appeal from a trial court's grant of a defendant's motion to suppress evidence seized on the basis of a canine sniff of defendant's car because it presented an issue involving the interpretation of criminal rules and would have widespread ramifications and provide guidance to law enforcement and courts. *State v. Thompson*, 2010 Ark. 294, — S.W.3d —, 2010 Ark. LEXIS 336 (June 17, 2010).

State's appeal from a trial court's grant of a new trial based on ineffective assistance of counsel turned on the specific facts of the case and did not involve the interpretation of the criminal rules with widespread ramifications. It was not a proper appeal pursuant to this rule and was dismissed. *State v. Robinson*, 2011 Ark. 90, — S.W.3d —, 2011 Ark. LEXIS 81 (Mar. 3, 2011).

Delinquency Case.

State was not entitled to appeal dismissal for violation of speedy trial in the delinquency proceeding, because under this rule, the correct and uniform administration of justice was not at issue, when after acknowledging its error in sua sponte nolle prosequing the delinquency petition, the circuit court determined which periods of time were excludable for the purposes of speedy trial. *State v. S.L.*,

2012 Ark. 73, — S.W.3d —, 2012 Ark. LEXIS 90 (Feb. 23, 2012).

Directed Verdict.

Arkansas law is well settled that the state is not permitted to appeal from a directed verdict acquitting the defendant when the sole issue is the sufficiency of the evidence of the defendant's guilt. *State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997).

Appeal dismissed where the state asserted as its ground for appeal that the trial judge improperly weighed the evidence in granting the motion for directed verdict and failed to consider the totality of the state's proof, viewing the evidence in a light most favorable to the state; the state was contending, in other words, that the trial judge erred in directing a verdict in favor of defendant because there was sufficient evidence presented to convict him of the charges, which is not a proper basis for an appeal by the state. *State v. Stephenson*, 330 Ark. 594, 955 S.W.2d 518 (1997).

In an appeal from the trial court's grant of a directed verdict of not guilty in defendant's murder trial, the state sought to have the Supreme Court determine whether the corroborating evidence submitted was sufficient to connect defendant to the offense under the accomplice-corroboration statute, § 16-89-111, but any decision in response to that portion of the state's appeal would have required consideration of the application of the statute to the specific facts of the case, which the Supreme Court would not do in appeals by the state. *State v. Fuson*, 355 Ark. 652, 144 S.W.3d 250 (2004).

Discretion of Court.

Trial court's determination was not subject to appeal where the trial court conducted a hearing, made a factual determination based on the pleadings and representations of the parties, and concluded that charges against defendant should be dropped because his right to a speedy trial had been violated. This determination was well within the trial court's discretion and did not require an interpretation of the court's rules, merely its application to the facts at hand. *State v. Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992).

Although the state's brief presented an important issue to the correct and uniform administration of the criminal law and upon which the court could hear an appeal pursuant to this rule, the state's direct appeal was not timely under Ark. R. App. P. Crim. 2(e) because the notice of appeal was not filed within 30 days of a written order; the court treated the appeal as if it were brought up on petition for writ of certiorari. *State v. Rowe*, 374 Ark. 19, 285 S.W.3d 614 (2008).

Evidence.

The Rules of Criminal Procedure permit an interlocutory appeal by the state only with respect to a pretrial order suppressing evidence since the rules are intended to permit the state to obtain a review of a ruling upon the admissibility of evidence essential to the prosecution's case. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980).

Where the defendant, who was charged with first degree murder, had not been at the apartment he shared with the deceased for almost a month preceding a warrantless search of the apartment, and he had taken a bus to another state where he established his residence and took a job, he had effectively abandoned the apartment so that the warrantless search did not violate his constitutional rights, thus the trial court should not have granted the defendant's motion to suppress the evidence seized during that search. *State v. Tucker*, 268 Ark. 427, 597 S.W.2d 584 (1980).

When a trial court exceeds its duty to determine the sufficiency of the evidence by judging the credibility of the evidence, it commits an error that requires correction. *State v. Long*, 311 Ark. 248, 844 S.W.2d 302 (1992).

Interlocutory Appeal.

Where the trial court, after a pretrial hearing in a possession of marijuana case, granted the defendants' motions to suppress the evidence, the state could not be granted an interlocutory appeal from that ruling once the taking of evidence began, since that appeal procedure was no longer available after the trial proceeded to the merits. *State v. Glenn*, 267 Ark. 501, 592 S.W.2d 116 (1980).

Where state, in first-degree murder prosecution, was denied the right to enter a videotaped deposition of a deceased witness into evidence, such denial was not subject to interlocutory appeal under this rule, since an interlocutory appeal can only be taken with respect to an order prior to commencement of a trial granting a motion to suppress evidence alleged to be illegally seized, as provided for under ARCrP 16.2. *State v. Russell*, 271 Ark. 817, 611 S.W.2d 518 (1981).

An interlocutory appeal, taken from the exclusion of evidence from a DNA analysis, was denied as an order not appealable under this section. *State v. Stuart*, 306 Ark. 24, 810 S.W.2d 939 (1991).

The state cannot perfect an interlocutory appeal after it has dismissed the case. *State v. Beall*, 321 Ark. 624, 906 S.W.2d 676 (1995).

Where the appellate court did not consider the merits of the trial court's suppression order but rather affirmed the trial court's order on the sole basis that the state's brief was not timely filed, the appellate court did not sustain the trial court's order "in its entirety" in order to effect a complete bar to

prosecution as subsection (d) of this rule contemplates; the effect of the decision allows the state to prosecute the defendant, but without the suppressed statements as evidence. *State v. Tien Ngoc Doan*, 326 Ark. 583, 933 S.W.2d 369 (1996).

The state was not entitled to an interlocutory appeal of the trial court's granting of a motion to suppress evidence where the trial court based its determination to suppress the evidence on the facts and circumstances surrounding the stop of the defendant, this was a fact-intensive matter for the court to resolve after receiving the evidence and weighing the credibility of the witnesses, and the trial court made no broad ruling that would impact future cases or have widespread ramifications on the law surrounding probable cause to make a vehicle stop. *State v. Guthrie*, 341 Ark. 624, 19 S.W.3d 10 (2000).

The state was not entitled to an interlocutory appeal of the suppression of evidence based upon the insufficiency of the description of the place to be searched in a search warrant where the state argued only that the description was sufficient and failed to demonstrate that the appeal involved the correct and uniform administration of the law. *State v. Howard*, 341 Ark. 640, 19 S.W.2d 4 (2000).

Because the trial court's order did not grant a defense motion under § 16-42-101 to allow evidence of the victim's prior sexual conduct and, in fact, specifically excluded that evidence, the trial court's order was not appealable by the state under subdivision (a)(3) of this rule. *State v. Rapp*, 368 Ark. 387, 246 S.W.3d 858 (2007).

Pursuant to this rule, the state's interlocutory appeal was dismissed because it failed to comply with the rule; the state's argument about whether defendant's grandmother was a "custodian" under § 9-27-317(h)(2)(A) was a question of fact not subject to appeal by the state under this rule. *State v. S.G.*, 373 Ark. 364, 284 S.W.3d 62 (2008).

Because a trial court's granting of the state's motion to nol-pros resulted in a final order of dismissal and the state could not perfect an interlocutory appeal after it had the case dismissed, the state's interlocutory appeal under subsection (a) of this rule was dismissed. *State v. C.W.*, 374 Ark. 116, 286 S.W.3d 118 (2008).

Because the Supreme Court of Arkansas had never required the "uniform administration of justice" analysis as it did in state appeals from the grant of a motion to suppress evidence or confessions, the state's appeal from an order allowing evidence under the rape-shield statute was treated as automatically appealable without resort to a normal analysis under this rule. *State v. Parker*, 2010 Ark. 173, — S.W.3d —, 2010 Ark. LEXIS 202 (Apr. 15, 2010).

State's interlocutory appeal of a circuit court order suppressing defendant's statement to police was subject to dismissal, where the issue on appeal was a mixed question of fact and law and thus was not a permissive ground for an appeal by the state. Although the state framed its argument in terms of whether the circuit court misinterpreted *Miranda* when it determined that defendant was in custody when he answered a police officer's question, the resolution of that issue turned on the circuit court's consideration of the facts surrounding the officer's interaction with defendant. *State v. Jenkins*, 2011 Ark. 2, — S.W.3d —, 2011 Ark. LEXIS 3 (Jan. 13, 2011).

Because the circuit court, in granting defendants' motion to suppress evidence of a meth lab seized after officers made a forced entry into their home, gave no explanation for its ruling, the state failed to demonstrate that the circuit court relied on or misinterpreted state law in granting the motion, as required by subsection (d) of this rule. *State v. Brewster*, 2011 Ark. 530, — S.W.3d —, 2011 Ark. LEXIS 605 (Dec. 15, 2011).

Jurisdiction.

Requirement that appeal on behalf of the state be taken by attorney general is mandatory and jurisdictional. *City of Little Rock v. Tibbett*, 301 Ark. 376, 784 S.W.2d 163 (1990).

Where the trial court acts within its discretion after making an evidentiary decision based on the facts on hand or even a mixed question of law and fact, this court will not accept an appeal under this rule. *State v. Edwards*, 310 Ark. 516, 838 S.W.2d 356 (1992).

Where the circuit court lacked jurisdiction of the offenses charged against juvenile, and should have dismissed the felony information on that basis, the state was not prejudiced by the circuit court's dismissal of the felony information on double jeopardy grounds. *State v. Gray*, 319 Ark. 356, 891 S.W.2d 376 (1995).

State could not appeal under this rule simply on the ground that the trial court erred in acquitting defendant upon defendant's post-trial motion, but where the state contended that the trial court acted without jurisdiction, the appellate court treated state's appeal as a petition for a writ of certiorari; under Ark. R. Crim. P. 33.3(c), posttrial motions were deemed denied on the 30th day after judgment was filed and, because defendant's post-trial motion was deemed denied on January 26, 2004, the trial court lost jurisdiction to rule on the merits of the motion after that date, thus, the trial court's ruling made on April 6, 2004, which resulted in the entry of an order of acquittal, was of no legal effect. *State v. Markham*, 359 Ark. 126, 194 S.W.3d 765 (2004).

Where *Bickerstaff* was the controlling law at the time of a hunting club owner's citation,

no other adequate remedy existed for the state or the Arkansas Game and Fish Commission (AGFC) and, consequently, the first requirement for granting a writ of certiorari had been met; however, the writ was denied because the circuit court clearly had authority to rule on the federal preemption issue. *Ark. Game & Fish Comm'n v. Herndon*, 365 Ark. 180, 226 S.W.3d 776 (2006).

Although appellate court dismissed state's appeal following the dismissal of defendant's charge for violating Ark. Game & Fish Comm'n Code § 15.05, in the future § 5-1-107(a) would be construed to allow such appeals because the act of violating an AGFC regulation was a misdemeanor. *State v. Herndon*, 365 Ark. 185, 226 S.W.3d 771 (2006).

Court accepted jurisdiction over the state's appeal in a criminal case pursuant to this rule because the court's holding would be important for the uniform administration of the criminal law; the state's appeal concerned a circuit court's authority to modify the sentencing portion of a negotiated plea agreement after it had accepted the plea but before it had entered the judgment and commitment order. *State v. Grisby*, 370 Ark. 66, 257 S.W.3d 104 (2007).

As to the state's appeal regarding the defense's use of victim-impact evidence under § 16-97-103, there was jurisdiction over the appeal because the application of statutory sentencing procedures required uniformity and consistency. However, the state's argument was not addressed because it was not preserved for review; the state's contemporaneous relevance objection did not encompass the arguments made on appeal. *Jones v. State*, 374 Ark. 475, 288 S.W.3d 633 (2008).

Appeal by the state of an order denying its petition to impose an adult sentence on an extended-juvenile-jurisdiction offender, § 9-27-503, and denying it motion for an extended-juvenile-jurisdiction review hearing, § 9-27-507, was dismissed because the issues did not fall within the ambit of this rule. *State v. K.H.*, 2010 Ark. 172, — S.W.3d —, 2010 Ark. LEXIS 201 (Apr. 15, 2010).

Order to Seal Criminal Convictions.

Reviewing court did not consider whether the state's appeal was proper under this rule, because the state's appeal from an order to seal criminal convictions, despite its criminal designation, was civil in nature and did not require satisfaction of or compliance with this rule. *State v. Martin*, 2012 Ark. 191, — S.W.3d —, 2012 Ark. LEXIS 210 (May 3, 2012).

Questions of Fact.

Where the appeal by the state presents only the question of the sufficiency of corroborating testimony of the appellee's accomplices in the commission of the crime charged, it will be denied, since that is a question of fact. *State v.*

Harvest, 26 Ark. App. 241, 762 S.W.2d 806 (1989).

Where state was not alleging that the trial court misapplied, or wrongfully interpreted the law, and the suppression of the evidence was fact-intensive, the state's appeal was not properly before the appellate court. *State v. Pruitt*, 347 Ark. 355, 64 S.W.3d 255 (2002).

Where defendant's motion to suppress was granted by the trial court and the state argued the trial court misapplied the holding of Arkansas precedent relating to exigent circumstances to the facts before it, the record showed the resolution of the issues turned on facts unique to the case and, thus, the matter was not appealable by the state under this rule. *State v. Nichols*, 364 Ark. 1, 216 S.W.3d 114 (2005).

In a criminal proceeding, state's appeal, seeking to have time excluded for other good cause when it was trying to obtain defendant's medical records, was dismissed because the appeal did not solely concern a matter of law pursuant to this rule; the appeal involved facts and circumstances unique to defendant's case rather than an interpretation of Arkansas rules with widespread ramifications. *State v. Johnson*, 374 Ark. 100, 286 S.W.3d 129 (2008).

Sentencing.

Sentencing and the manner in which such punishment provisions can be imposed arise in every criminal case where a conviction is obtained, and the application of these statutory sentencing procedures to convict defendants requires uniformity and consistency, conferring on the Arkansas Supreme Court jurisdiction of an appeal from a trial court's deviation from statutory sentencing procedures. *State v. Freeman*, 312 Ark. 34, 846 S.W.2d 660 (1993).

Where amendments to sentencing provisions affected the defendant's sentence, the issue was one important to the correct and uniform administration of justice. *State v. Townsend*, 314 Ark. 427, 863 S.W.2d 288 (1993).

Where the sentence imposed by the trial court was erroneous because it impermissibly usurped the prosecutor's constitutional duties in violation of the doctrine of separation of powers, the state was authorized to appeal pursuant to subsections (b) and (c) of this rule. *State v. Murphy*, 315 Ark. 68, 864 S.W.2d 842 (1993).

Although there has been a precedent set as to the prospective application of Acts 1992, No. 192, an appeal by the state under subsection (c) of this rule was accepted in order to perpetuate uniformity in sentencing; evenhandedness on the part of the sentencing courts is necessary for the proper administration of justice. *State v. Williams*, 315 Ark. 464, 868 S.W.2d 461 (1994).

The possible retroactive application of a new and reduced criminal penalty is important to the correct and uniform administration of criminal law in this state. *State v. Kinard*, 319 Ark. 360, 891 S.W.2d 378 (1995).

Appeal was properly brought by the state to the appellate court pursuant to subsections (b) and (c) of this rule where the application of sentencing procedures to convict defendants required uniformity and consistency, and to appeal the imposition of a void or illegal sentence by the trial court. *State v. Hardiman*, 353 Ark. 125, 114 S.W.3d 164 (2003).

Appellate court had jurisdiction over state's appeal because it involved sentencing, and erroneous application of the sentencing statutes affected the correct and uniform administration of justice. *State v. Pinell*, 353 Ark. 129, 114 S.W.3d 175 (2003).

Where the state contested the manner in which the circuit court determined the number of DWI offenses for purposes of sentencing, the case satisfied the criteria of subsection (c) of this rule; because the sentencing determination by the circuit court constituted an error that had been committed to the prejudice of the state, the correct and uniform administration of criminal law required review by the appellate court. *State v. Sola*, 354 Ark. 76, 118 S.W.3d 95 (2003).

Where the issue raised by the state's appeal concerned the trial court's authority to sentence a defendant to probation under the habitual criminal offender statute, the appellate court had jurisdiction as the issue was important to the correct and uniform administration of criminal law; further, the state may appeal the imposition of a void or illegal sentence by the trial court. *State v. Joslin*, 364 Ark. 545, 222 S.W.3d 168 (2006).

State's appeal of a trial judge's failure to recuse himself from a sentencing hearing was not appealable under subsection (c) of this rule because this issue was based on the particular facts of the case; it was not a case requiring an interpretation of criminal rules with widespread ramification. After having ex parte communication with a juror between the jury's verdict and the sentencing hearing, the judge reduced the sentence entered by the jury and removed the fine in an assault case; the state contended that the judge should have recused himself. *Barritt v. State*, 372 Ark. 395, 277 S.W.3d 211 (2008).

Speedy Trial Dismissal.

When defendant was arrested on April 12, 2006 for 257 counts of felony theft of property, the state requested his release pending fur-

ther investigation and a felony information was filed against him on December 6, 2006; the trial was delayed and the circuit court dismissed the case for lack of speedy trial on December 10, 2008. The state was not permitted to bring an appeal under this rule; because the speedy trial rule, Ark. R. Crim. P. 28.2, was amended in 2007, the state's challenge to an interpretation of a prior version of Rule 28.2 was not important to the correct administration of the criminal law and would not have widespread ramifications. *State v. Weatherspoon*, 2009 Ark. 459, — S.W.3d —, 2009 Ark. LEXIS 618 (2009).

Timeliness.

Appellate court refused to consider the state's cross-appeal in defendant's appeal of his murder and kidnapping conviction when the state did not file its cross-appeal within 30 days as required. *Smith v. State*, 347 Ark. 277, 61 S.W.3d 168 (2001).

Transcript.

Where notice of an appeal from an interlocutory order was filed on February 19, but the transcript was not filed by the attorney general until May 20, the Supreme Court did not have jurisdiction since the appeal was not filed within the 60-day period as required by subsection (c) of this rule. *State v. Bland*, 260 Ark. 511, 542 S.W.2d 497 (1976).

Appeal was dismissed where the transcript was not filed within the 60-day period as required, thus, the court did not have jurisdiction. *State v. Thurman*, 305 Ark. 448, 808 S.W.2d 762 (1991).

Cited: *State v. McFadden*, 327 Ark. 16, 938 S.W.2d 797 (1997); *State v. Vasquez-Aerreola*, 327 Ark. 617, 940 S.W.2d 451 (1997); *State v. Zawodniak*, 329 Ark. 179, 946 S.W.2d 936 (1997), cert. denied 522 U.S. 1125, 118 S. Ct. 1072, 140 L. Ed. 2d 131 (1998); *Ashe v. State*, 57 Ark. App. 99, 942 S.W.2d 267 (1997); *State v. Donahue*, 334 Ark. 429, 978 S.W.2d 748 (1998); *State v. Stephenson*, 340 Ark. 229, 9 S.W.3d 495 (2000); *State v. Dawson*, 343 Ark. 683, 38 S.W.3d 319 (2001); *Byndom v. State*, 344 Ark. 391, 39 S.W.3d 781 (2001); *Smith v. State*, 354 Ark. 226, 118 S.W.3d 542 (2003); *State v. Brown*, 356 Ark. 460, 156 S.W.3d 722 (2004); *State v. Britt*, 368 Ark. 273, 244 S.W.3d 665 (2006); *State v. Lee*, 373 Ark. 12, 280 S.W.3d 28 (2008); *State v. Stites*, 2009 Ark. 154, 300 S.W.3d 103 (2009); *State v. Mancia-Sandoval*, 2010 Ark. 134, 361 S.W.3d 835 (2010); *State v. Threadgill*, 2011 Ark. 91, — S.W.3d —, 2011 Ark. LEXIS 84 (Mar. 3, 2011); *State v. A.G.*, 2011 Ark. 244, — S.W.3d —, 2011 Ark. LEXIS 224 (June 2, 2011).

Rule 4. Time for filing record, contents of record.

(a) *Generally.* Except as provided in this rule, matters pertaining to several appeals, the docketing, designation, abbreviation, stipulation, preparation, and correction or modification of the record on appeal, as well as appeals where no stenographic record was made, shall be governed by the Rules of Appellate Procedure — Civil and any statutes presently in force which apply to civil cases on appeal to the Supreme Court.

(b) *When filed.* When an appeal is taken by the defendant, the record on appeal shall be filed with the clerk of the appellate court and docketed therein within ninety (90) days from the filing of the notice of appeal. For purposes of determining the date of filing of a notice of appeal, Arkansas Rule of Appellate Procedure — Criminal 2(b) shall apply. The time for filing the record with the clerk of the appellate court may be extended by the circuit court as provided in subsection (c).

(c) *Extension of time.*

(1) If any party has designated stenographically reported material for inclusion in the record on appeal, the circuit court, by order entered before expiration of the period prescribed by subdivision (b) of this rule or by a prior extension order, may extend the time for filing the record. A motion by the defendant for an extension of time to file the record shall explain the reasons for the requested extension, and a copy of the motion shall be served on the prosecuting attorney. The circuit court may enter an order granting the extension if the circuit court finds that all parties consent to the extension and that an extension is necessary for the court reporter to include the stenographically reported material in the record on appeal. If the prosecuting attorney does not file a written objection to the extension within ten (10) days after being served a copy of the extension motion, the prosecuting attorney shall be deemed to have consented to the extension, and the circuit court may so find. If the prosecuting attorney files a written objection to the extension within ten (10) days after being served a copy of the extension motion, the circuit court may not grant the extension unless the circuit court makes the following findings:

(A) The defendant has filed a motion explaining the reasons for the requested extension and has served a copy of the motion on the prosecuting attorney;

(B) The time to file the record on appeal has not yet expired;

(C) All parties have had the opportunity to be heard on the motion, either at a hearing or by responding in writing;

(D) The defendant has timely ordered the stenographically reported material from the court reporter and either (i) made any financial arrangements required for preparation of the record, or (ii) filed a petition to obtain the record as a pauper; and

(E) An extension of time is necessary for the court reporter to include the stenographically reported material in the record on appeal.

(2) In no event shall the time for filing the record be extended more than seven (7) months from the date of the entry of the judgment or order, or from the date on which a timely post-judgment motion is deemed to have been disposed of under Arkansas Rule of Appellate Procedure — Criminal 2(b), whichever is later.

(3) If the appellant has obtained the maximum seven-month extension available from the circuit court, or demonstrates (by affidavit or otherwise) an inability to obtain entry of an order of extension, then before expiration

of the period prescribed by subdivision (b) of this rule or a prior extension order, the appellant may file with the clerk of the appellate court a petition for writ of certiorari pursuant to Rule 3-5 of the Rules of the Supreme Court and Court of Appeals.

(d) *Exhibits.* Photographs, charts, drawings and other documents that can be inserted into the record shall be included. Documents of unusual bulk or weight shall not be transmitted by the trial court clerk unless the clerk is directed to do so by a party or by the clerk of the appellate court. Physical evidence, other than documents, shall not be transmitted unless directed by an order of the appellate court. If the record contains photographs, DVDs, or any other visual medium alleged by either party to the appeal to constitute child pornography, a motion to seal the record, stating the reason therefor, shall accompany the record when it is filed with the clerk of the appellate court.

(e) *Record for preliminary hearing in appellate court.* Prior to the time the complete record on appeal is settled and certified as herein provided, either party to the appeal may docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for fixing or reducing bail, to proceed in forma pauperis, or for any intermediate order. The clerk of the trial court, at the request of the moving party, shall certify and transmit to the clerk of the appellate court a copy of such portion of the record of proceedings as may be available or needed for the purpose.

(f) Subsections (b) and (c) of this rule shall not apply to an appeal by the state pursuant to Rule of Appellate Procedure — Criminal 3. (Adopted and amended July 10, 1995, effective January 1, 1996; amended November 20, 1995; amended September 18, 2008, effective October 1, 2008.)

Reporter's Notes to Rule 4 (1995): Subsection (a) of this rule is former ARCrP 36.23 slightly modified by adding a reference to the Rules of Appellate Procedure—Civil. Most of the statutes once applying to civil appeals have been superseded. See Ark. Code Ann. §§ 16-67-301 *et seq.* (Michie 1987 and Michie Supp. 1993); *In the Matter of Statutes Deemed Superseded by the Arkansas Rules of Appellate Procedure*, 290 Ark. 616, 719 S.W.2d 436 (1986) (per curiam).

Subsection (b) of this rule is former ARCrP 36.19.

Subsection (c) of this rule is former ARCrP 36.20.

Addition to Reporter's Notes to Rule 4 (2008): The 2008 changes added subsections (b), (c), and (f), added the last sentence of subsection (d), and made minor editorial changes to the other subsections.

Prior to the 2008 changes, an extension of time to file the record in a criminal case was governed by Arkansas Rule of Appellate Pro-

cedure — Civil 5(b), which requires the circuit court to find that all parties have had the opportunity to be heard on an extension motion. Subsection (c) requires the court to make such a finding only if the prosecuting attorney objects to the extension. The extension order must reflect that the prosecuting attorney consents to the extension, but defense counsel can either obtain such consent before filing the extension order or such consent can be presumed from the prosecutor's failure to object to the extension motion.

The last sentence of subsection (d) protects the privacy of innocent victims of child pornography. A similar change, covering the contents of briefs on appeal, has been made to Rules of the Supreme Court and Court of Appeals 4-3.

Subsection (f) makes clear that the state cannot request an extension of time to file the record when it takes an appeal pursuant to Arkansas Rule of Appellate Procedure — Criminal 3.

CASE NOTES

ANALYSIS

In general.

Contents of record.
Timeliness.

In General.

This rule embraces Rule 9 of the Inferior Court Rules [now District Court Rules]; Rule 9(a), expressly governing civil appeals, applies to criminal appeals. *Bocksnick v. City of London*, 308 Ark. 599, 825 S.W.2d 267 (1992).

Where defendant was convicted of capital murder and there were three eyewitnesses, and where pursuant to a writ of certiorari the court reporter returned the writ without the original photo lineup and instead tendered a black-and-white photocopy, and where defendant moved for summary reversal of his conviction based upon the omission of the original photo array, defendant had failed to object to the eyewitnesses' in-court identifications at trial, and because defendant's only point on appeal would have been procedurally barred, the appellate court held that the record on appeal was sufficient without the original photo array. *Lewis v. State*, 354 Ark. 359, 123 S.W.3d 891 (2003).

Contents of Record.

Trial court's failure to record or transcribe purportedly prejudicial incident at trial was not reversible error where the trial court reconstructed the incident consistent with the rules of procedure. *Smith v. State*, 324 Ark. 74, 918 S.W.2d 714 (1996).

The court reporter's inability to submit the record of testimony was good cause to grant appellant's motion for remand to the trial court. *Schlesier v. State*, 330 Ark. 219, 953 S.W.2d 575 (1997).

Court ordered the trial court to settle the record and ordered defendant to file a substituted abstract and brief, for purposes of this rule, Ark. R. App. P.—Civ. 6(e), and Ark. Sup. Ct. & Ct. App. R. 4-2(a)(8); the record and brief, submitted in this appeal, allowed the court to address the case's merits. *Reyes v. State*, 2012 Ark. App. 358, — S.W.3d —, 2012 Ark. App. LEXIS 474 (May 23, 2012).

Timeliness.

Where the trial judge had granted petitioner's counsel an extension of the time for filing a transcript, and the petitioner's counsel then didn't tender the record to the Supreme Court until more than seven months had elapsed from the date of the criminal judgment, the record was not tendered timely, but because the petitioner's counsel said the delay was his fault due to a computation error, the court granted the out-of-time appeal. *Moore v. State*, 267 Ark. 548, 592 S.W.2d 450 (1980); *Moore v. State*, 268 Ark. 191, 609 S.W.2d 894 (1980).

Order extending the time for filing record, granted on the 90th day as required by RAP-Civ 4, but not "entered" as required by RAP-Civ 5(b), was not timely. *Willis v. State*, 323 Ark. 41, 912 S.W.2d 430 (1996).

Under former ARCrP 36.22 (now see ARCrP

33.3), because defendant filed a motion for reconsideration prior to the time fixed to file a notice of appeal, he had 30 days from the disposition of that motion in which to file a notice of appeal, and thus his notice or appeal filed five days after denial of the motion for reconsideration was timely. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

The 90-day period allowed by Ark. R. App. P. Civ. 5(a) for filing the record on appeal regarding defendant's conviction of a misdemeanor offense began to run on the effective date of defendant's original notice of appeal, which was the date following the trial court's denial of defendant's posttrial motion, and not the date on which defendant filed a second notice of appeal, which served only to amend the first notice by including the denial of the motion as one of the issues being appealed; thus, defendant's counsel was given 30 days to accept full responsibility for the late filing or defendant's motion for a rule on the clerk to allow a late filing of the record would be denied. *Smith v. State*, 351 Ark. 325, 97 S.W.3d 380 (2002).

Appellate court directed a clerk to accept defendant's appeal even though the notice of appeal was untimely and the record was not filed timely under subsection (a) of this rule where the attorney stated in her motion for rule on the clerk that defendant was not at fault for the appeal and record not being timely filed. *Smith v. State*, 363 Ark. 576, 215 S.W.3d 588 (2005).

Clerk of the supreme court properly refused to file a record because it was tendered outside the time period for docketing the case based on the date the original judgment order was entered; however, defendant was not penalized for the fault of his attorney, which was clear from the record. *Morris v. State*, 373 Ark. 190, 282 S.W.3d 757 (2008).

Court clerk should have filed a movant's notice of appeal on the day the notice of appeal was filed from the denial of his motion for postconviction relief, whether or not the movant was allowed to proceed in forma pauperis. The motion to file a belated appeal was allowed because, but for this clerical error, the notice of appeal was timely filed. *White v. State*, 373 Ark. 415, 284 S.W.3d 64 (2008).

Where defendant was convicted of two counts of rape and two counts of sexual assault, the judgment and commitment order was entered on May 5, 2008; the time for filing the record on appeal expired on August 27, 2008 in accordance with subsection (a) of this rule. Defendant's tender of the record on August 28, 2008 was untimely and counsel did not admit fault but his fault was clear from the record; therefore, the Supreme Court of Arkansas was permitted to grant defendant's motion for rule on clerk and the clerk

was directed to accept the record. *Bryant v. State*, 374 Ark. 329, 287 S.W.3d 599 (2008).

Petitioner was not entitled to mandamus relief (seeking a ruling on the motion for extension of time to lodge the record on appeal), because the petitioner filed his petition to vacate and or to set aside the judgment in the circuit court nearly five years after the date of his conviction. Section 16-112-202(10)(B) mandated that there shall be a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction and since the DNA testing was available at the time of his trial, the petitioner's attempt to rebut the presumption against timeliness failed, and nothing in the record suggested that the prosecuting attorney was properly served and the petition for writ of mandamus did not allege that the prosecuting attorney was served.

Mitchael v. State, 2012 Ark. 256, — S.W.3d —, 2012 Ark. LEXIS 263 (May 31, 2012).

Tender of the record was timely, because the petitioner's notice of appeal was deemed filed on November 23, 2011, and the tender of the record on February 8, 2012, seventy-seven days after that date, was therefore timely; in circumstances such as were present in the instant case, where the request for a ruling on the omitted issue was still pending when the petitioner filed his notice of appeal, the notice of appeal was deemed filed on the day after the order disposing of the request for a ruling was entered. *Lewis v. State*, 2012 Ark. 355, — S.W.3d —, 2012 Ark. LEXIS 267 (May 31, 2012).

Cited: *Cook v. State*, 327 Ark. 125, 937 S.W.2d 641 (1997); *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000).

Rule 5. No bond for costs.

There shall be no bond for costs as a prerequisite for the appeal of either a felony or misdemeanor conviction. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 5 (1995): This rule is former ARCrP 36.17. In the title, "cost"

has been changed to "costs."

CASE NOTES

Cited: *McGehee v. State*, 323 Ark. 704, 916 S.W.2d 756 (1996); *Finch v. State*, 329 Ark.

319, 947 S.W.2d 11 (1997); *Smith v. State*, 341 Ark. 252, 15 S.W.3d 344 (2000).

Rule 6. Bail on appeal.

(a) The appeal bond provided for in this rule shall be filed in the office of the clerk of the court in which the conviction is had, and a copy thereof shall be attached to the bill of exceptions and shall be made a part of the transcript to be filed in the Supreme Court.

(b)(1) When a defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to an offense other than one specified in subsection (b)(2) or (b)(3) of this section, and he is sentenced to serve a term of imprisonment, and he has filed a notice of appeal, the trial court shall not release the defendant on bail or otherwise pending appeal unless it finds:

(A) By clear and convincing evidence that the defendant is not likely to flee or that there is no substantial risk that the defendant will commit a serious crime, intimidate witnesses, harass or take retaliatory action against any juror, or otherwise interfere with the administration of justice or pose a danger to the safety of any other person; and

(B) That the appeal is not for the purpose of delay and that it raises a substantial question of law or fact.

(2) When the defendant has been found guilty, pleaded guilty, or pleaded nolo contendere to capital murder, the trial court shall not release the defendant on bail or otherwise, pending appeal or for any reason.

(3) When the defendant has been found guilty, pleaded guilty, or pleaded *nolo contendere* to murder in the first degree, rape, aggravated robbery, or causing a catastrophe, or kidnapping or arson when classified as a Class Y felony, and he has been sentenced to death or imprisonment, the trial court shall not release him on bail or otherwise, pending appeal or for any reason.

(c)(1) If an appeal bond is granted by the trial court, it shall be conditioned on the defendant's surrendering himself to the sheriff of the county in which the trial was held upon the dismissal of the appeal or upon the rendition of final judgment upon the appeal. The trial court may also condition release by imposing restrictions specified in ARCrP 9.3 or other restrictions found reasonably necessary.

(2) Following the affirmance or reversal of a conviction, or the dismissal of an appeal, the Clerk of the Supreme Court shall immediately make and forward to the clerk of the circuit court of the county in which the defendant was convicted a certified copy of the mandate of the Supreme Court.

(3) The circuit clerk, upon receipt of a mandate affirming the conviction, shall immediately file the mandate and notify the sheriff and the bail bondsman or, in appropriate cases, other sureties on the bail bond that the defendant should be surrendered to the sheriff as required by the terms of the bail bond.

(4) If the defendant fails to surrender himself to the sheriff in compliance with the conditions of his bond, the sheriff shall notify the clerk of the circuit court, and the circuit court shall direct that fact to be entered on its records and shall adjudge the bail bond of the defendant, or the money deposited in lieu thereof, to be forfeited.

(5) The defendant having failed to surrender, the circuit clerk shall immediately issue a summons against the sureties on the bail bond requiring them to appear and show cause why judgment should not be rendered against them for the sum specified in the bail bond on account of the forfeiture thereof, which summons shall be made returnable and shall be executed as in civil actions, and the action shall be docketed and shall proceed as an ordinary civil action.

(6) The summons may be served as provided by law in any place in which the sureties may be found, and the service of the summons on the defendant or defendants shall give the court complete jurisdiction of the defendant and cause.

(7) No pleadings on the part of the state shall be required in such cases.

(d) The circuit court in which the defendant was convicted shall retain jurisdiction to hear and decide any motion to revoke the bail of a defendant set at liberty pursuant to this rule, even if the record on appeal has been lodged with the Supreme Court or the Court of Appeals.

(e) If the court in which the defendant was convicted refuses to grant an appeal bond, and an appeal bond shall thereafter be granted by any Justice or Justices of the Supreme Court, the bond shall be conditioned that, upon the dismissal of the appeal or the rendition of the final judgment therein by the Supreme Court, the defendant shall surrender himself as provided in this rule in execution of the judgment. (Amended March 27, 1995; adopted and amended July 10, 1995, effective January 1, 1996; amended effective October 21, 1999.)

Reporter's Notes to Rule 6 (1995): This rule is former ARCrP 36.5. In March 1994, the General Assembly enacted 1994 Ark. Acts 3,

First Extraordinary Session. The act, which governed bail on appeal after conviction, was struck down by the Arkansas Supreme Court

in *Casement v. State*, 318 Ark. 225, 884 S.W.2d 593 (1994), the Court having found that the act conflicted with post-conviction appeal procedures established by rules of the Court.

Rule 6 is, in essence, Act 3, modified to eliminate the requirement that a defendant free on bail pending appeal surrender to the Arkansas Supreme Court upon the affirmation of his conviction. Under this rule the defendant is to surrender to the sheriff of the county in which the defendant was convicted.

The term "bail bond" in subsection (a) of the act has been replaced by "appeal bond" in subpart (a) of the rule. In addition, subpart (b)(1) of the rule, restating subsection (b)(1) of Act 3, has been modified to speak of filing "a notice of appeal" rather than "an appeal," it being reasonably clear that this was the intent of the Act 3's drafters.

Subpart (c)(1) of the rule, restating subsection (c)(1) of Act 3, has been amended to speak

of the circuit court's granting an "appeal bond" rather than "the appeal." Guidelines for imposing conditions of release have been included.

Subpart (d) vests jurisdiction to hear revocation motions in the circuit court.

Subpart (e), restating subsection (d)(1) of Act 3, has been amended to speak of the trial court's granting "an appeal bond," not "an appeal." The rule contains no counterpart of subsection (d)(2) of the act, which was viewed as surplusage.

Finally, language clarifying the procedure to be followed by the Clerk of the Supreme Court and circuit clerks has been added.

Rule 6 will supersede ARCrP 36.5 through 36.8.

Publisher's Notes. The 1999 amendment to this Rule inserted "or the dismissal of an appeal" in subdivision (c)(2). The effect of this amendment was to provide that the circuit clerk be notified when an appeal is dismissed.

1987 Unofficial Supplementary Commentary to former Rule 36.5 [now RAP-Crim 6]

Rule 9.2(e), governing pretrial release bonds guaranteeing subsequent appearances on the same charge before other courts, does not govern appeals, which are explicitly covered by Rules 36.5-36.7. *Perry v. State*, 275 Ark. 170, 628 S.W.2d 304 (1982). The written

finding requirement of Rule 9.2(e) does not apply to appeal bonds set under Rule 36, so the judge, having heard the evidence and knowing the sentence, can set an appeal bond without making written findings. *Perry v. State*.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Criminal Procedure, 11 U. Ark. Little Rock L.J. 187.

CASE NOTES

ANALYSIS

Constitutionality.
Construction.
Amount of bond.
Delay.
Murder conviction.
Pending appeal.

Constitutionality.

Subdivision (b)(3) of this rule is not unconstitutional, notwithstanding that it prohibits release on appeal in certain cases without providing a hearing. *Meeks v. State*, 341 Ark. 620, 19 S.W.3d 25 (2000).

Denial of bail on appeal to a defendant convicted of first-degree murder did not constitute "excessive bail" in violation of U.S. Const., Amend. VIII or Ark. Const., Art. 2, § 9, as bond on appeal was not absolute right. *Smith v. State*, 345 Ark. 472, 48 S.W.3d 529 (2001).

Construction.

Bondsman was not exonerated as a matter of law when defendant appeared for trial after the first conviction was reversed on appeal; although a condition of defendant's release pending appeal was that if the case was affirmed, or reversed but remanded for a new trial, the defendant would surrender to the sheriff, this rule did not say that when either of those eventualities occurs the original bond must be discharged and a new bond substituted. *Garrett v. State*, 294 Ark. 556, 744 S.W.2d 731 (1988).

Even if a pretrial release bond under ARCrP 9.2 continues pending appeal, that does not make it an appeal bond as governed by this rule and former ARCrP 36.6 and 36.7. *Garrett v. State*, 294 Ark. 556, 744 S.W.2d 731 (1988).

Both § 16-91-110 and this rule require trial court to consider whether criminal defendant

(1) will appear at the conclusion of appellate proceedings and (2) the likelihood of conviction before granting bond on appeal. *Vineyard v. State*, 29 Ark. App. 180, 782 S.W.2d 370 (1989).

Amount of Bond.

Where prior to his trial the defendant had been free on a \$10,000 pretrial release bond but at his trial the defendant was sentenced to concurrent terms of 40 and six years after a jury found him guilty of first-degree murder and second-degree battery, the circuit judge could properly fix his appeal bond at \$50,000 without making written findings to support the increased bond because the two types of bonds were clearly distinguishable, and in fixing the appeal bond the circuit judge knew the actual sentence imposed and, therefore, was in an improved position to weigh the risk of the defendant's nonappearance pending appeal. *Perry v. State*, 275 Ark. 170, 628 S.W.2d 304 (1982).

Delay.

Trial court's order denying bail pending appeal was upheld by appellate court where trial court concluded that appeal was intended only for purposes of delay and did not raise a substantial question of law or fact. *Vineyard v. State*, 29 Ark. App. 180, 782 S.W.2d 370 (1989).

Habeas corpus relief was granted in favor of petitioner who argued that the state waived jurisdiction over petitioner through its gross negligence for failing to turn petitioner over as soon as the circuit clerk's office had received the mandate affirming petitioner's conviction and notifying the sheriff and bail bondsman that petitioner should have been surrendered to law enforcement officials for a period of five years. *Bonebrake v. Norris*, 319 F. Supp. 2d 928 (E.D. Ark. 2003), rev'd 417 F.3d 938 (8th Cir. 2005).

Murder Conviction.

The defendant stood convicted of first degree murder and was not entitled to bail

pending appeal where (1) after he was convicted, the defendant filed a petition for post-conviction relief, (2) the state moved to dismiss, and the defendant amended his petition to assert, in the alternative, that he was entitled to relief through a writ of error coram nobis, (3) the trial court dismissed the motion, and the defendant appealed to the Supreme Court, and (4) the Supreme Court affirmed the motion to dismiss the petition for postconviction relief, reversed the finding that the time limits of such a petition apply to a writ of error coram nobis, and granted leave to the circuit court to determine whether a writ of error coram nobis should be issued. *Larimore v. State*, 339 Ark. 167, 3 S.W.3d 680 (1999).

Pending Appeal.

Provision that bond will continue in effect "pending appeal" means the bond will remain in effect until the appeal is completed, but does not mean that the bond remains in effect only until the appeal commences. *Garrett v. State*, 294 Ark. 556, 744 S.W.2d 731 (1988).

Because the appellate court affirmed the trial court's judgment convicting defendant of possession of drug paraphernalia with intent to manufacture and possession of a controlled substance, defendant's issue of bail pending appeal became moot and the appellate court did not have to decide moot issues; the appropriate and meaningful action that defendant could have taken would have been to petition the appellate court for a writ of certiorari separately challenging the trial court's denial of an appeal bond. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003).

Circuit court had the authority to release defendant on bail pending appeal if it found that defendant met the requirements of subsection (b) of this rule because defendant was found guilty of criminal contempt, was sentenced to a term of imprisonment and fined \$1,000, and filed a notice of appeal. *Olmstead v. Olmstead*, 373 Ark. 354, 284 S.W.3d 27 (2008).

Cited: *J & J Bonding, Inc. v. State*, 330 Ark. 599, 955 S.W.2d 516 (1997).

Rule 7. Appeal after confinement.

If a judgment of confinement in a detentional facility operated by the state has been executed before notice of appeal is given, the defendant shall remain in the detentional facility during the pendency of the appeal, unless discharged by the expiration of his term of confinement or by pardon or parole, or admitted to bail by the trial court prior to the docketing of the appeal in the Supreme Court. If the trial court or a Justice or Justices of the Supreme Court admit the defendant to bail pending appeal, the commitment by which the sentence was carried into execution may be recalled. Upon a reversal, if a new trial is ordered, the defendant shall be removed from the detentional facility and returned to the custody of the sheriff of the

county in which the sentence was imposed. (Amended December 18, 1978; adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 7 (1995): This rule is former ARCrP 36.13, with grammatical changes.

Rule 8. Exceptions and motion for new trial unnecessary.

Motions for New Trial. It shall not be necessary to file a motion for new trial to obtain review of any matter on appeal. If a motion for new trial is submitted to the trial court, on appeal the appellant shall not be restricted to a consideration of matters assigned therein. Formal exceptions to rulings or orders of the trial court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefore; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 8 (1995): This rule is former ARCrP 36.21(a).

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Criminal Procedure, 11 U. Ark. Little Rock L.J. 187.

CASE NOTES

ANALYSIS

Objection.

— Grounds.

— Necessity.

— Ruling.

— Timeliness.

Objection.

— **Grounds.**

Where the pretrial suppression motion was not originally based upon the violation of ARCrP 8.1 relating to prompt first appearance, appellate court will not consider the argument on appeal that it should have been granted on that basis pursuant to this rule. *Allen v. State*, 297 Ark. 155, 760 S.W.2d 69 (1988).

— **Necessity.**

Where the defendant argued for the first time on appeal that the trial court erred in refusing to conduct the jury voir dire in accordance with this section, that contention was not properly before the reviewing court since the defendant had not made a specific objection to the trial court in order to preserve the

right to appellate review. *Crafton v. State*, 274 Ark. 319, 624 S.W.2d 440 (1981).

Constitutional objections and fundamental constitutional rights can be waived if not adequately preserved for appeal. *Collins v. State*, 308 Ark. 536, 826 S.W.2d 231 (1992).

This rule requires a contemporaneous objection in order to preserve a point for review on appeal. *Miller v. State*, 309 Ark. 117, 827 S.W.2d 149 (1992).

— **Ruling.**

The failure to obtain a ruling on an objection precludes review of the issue which was the subject matter of the objection on appeal. *McArthur v. State*, 309 Ark. 196, 830 S.W.2d 842 (1992).

— **Timeliness.**

In order to preserve an argument for appeal, the appellant must make an objection at the first opportunity and where the motion for mistrial was not made until well into the trial, nearing the close of the state's case, it was untimely. *Williams v. State*, 304 Ark. 218, 800 S.W.2d 713 (1990).

Rule 9. Acquittal barring prosecution.

A judgment in favor of the defendant that operates as a bar to future prosecution of the offense shall not be reversed by the Supreme Court. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 9 (1995): This rule is former ARCrP 36.11. This rule does not bar an appeal by the state of a trial court's granting of a defendant's motion for judgment notwithstanding a jury's verdict of guilty. See *State v. Schaub*, 310 Ark. 76, 832 S.W.2d 843 (1992), where the Arkansas Supreme Court,

without citing this rule, held that the state can appeal a trial court's grant of a defendant's motion for a judgment notwithstanding the jury's verdict of guilty because such an appeal by the state, if successful, results in reinstatement of the verdict of guilty and does not subject the defendant to a second trial.

Rule 10. Automatic appeal and mandatory review in death-sentence cases; procedure on affirmance.

(a) *Automatic appeal.* Upon imposing a sentence of death, the circuit court shall order the circuit clerk to file a notice of appeal on behalf of the defendant within thirty (30) days after entry of judgment. The notice of appeal shall be in the form annexed to this rule. The court reporter shall transcribe all portions of the criminal proceedings consistent with Article III of the Rules of the Supreme Court and shall file the transcript with the circuit clerk within ninety (90) days after entry of the judgment. Within thirty (30) days after receipt of the transcript, the circuit clerk shall compile the record consistent with Article III and shall file the record with the clerk of the Arkansas Supreme Court for mandatory review consistent with this rule and for review of any additional issues the appellant may enumerate.

(b) *Mandatory review.* Whenever a sentence of death is imposed, the Supreme Court shall review the following issues in addition to other issues, if any, that a defendant may enumerate on appeal. Counsel shall be responsible for abstracting the record and briefing the issues required to be reviewed by this rule and shall consolidate the abstract and brief for such issues and any other issues enumerated on appeal. The Court shall consider and determine:

(i) pursuant to Rule 4-3(h) of the Rules of the Supreme Court and Ark. Code Ann. § 16-91-113(a), whether prejudicial error occurred;

(ii) whether the trial court failed in its obligation to bring to the jury's attention a matter essential to its consideration of the death penalty;

(iii) whether the trial judge committed prejudicial error about which the defense had no knowledge and therefore no opportunity to object;

(iv) whether the trial court failed in its obligation to intervene without objection to correct a serious error by admonition or declaring a mistrial;

(v) whether the trial court erred in failing to take notice of an evidentiary error that affected a substantial right of the defendant;

(vi) whether the evidence supports the jury's finding of a statutory aggravating circumstance or circumstances; and

(vii) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.

(c) *Procedure on affirmance.* When a judgment of death has been affirmed, the denial of post-conviction relief has been affirmed, or a mandate has been returned from the United States Supreme Court, and the day of execution has passed, the Clerk of the Supreme Court shall transmit to the Governor a certificate of the affirmance or return of mandate and judgment,

to the end that a warrant for the execution of the judgment may be issued by the Governor. Such certificate shall operate to dissolve any stay of execution previously entered by the Supreme Court or any stay of execution previously entered by a circuit court pending disposition of a petition for post-conviction relief.

FORM: CLERK'S NOTICE OF APPEAL TO THE ARKANSAS SUPREME COURT IN DEATH-SENTENCE CASE PURSUANT TO RULE 10 OF THE RULES OF APPELLATE PROCEDURE — CRIMINAL

IN THE CIRCUIT COURT OF _____ COUNTY,
ARKANSAS
DIVISION _____ DISTRICT _____
STATE OF ARKANSAS

_____ PLAINTIFF
vs. Case No. _____
_____ DEFENDANT

NOTICE OF APPEAL FROM JUDGMENT IMPOSING DEATH SENTENCE

CONVICTION(S) APPEALED (list all offenses appealed): _____

DATE OF ENTRY OF JUDGMENT: _____
SENTENCE(S) (List all sentences in addition to sentence(s) of death): _____

INDIGENT: () YES () NO

NAME AND COMPLETE ADDRESS OF:

1. COURT REPORTER(S) (List all court reporters; use additional pages if needed):

_____	_____	_____	_____
(name)	(telephone)		
_____	_____	_____	_____
(address)	(city)	(state)	(zip code)
_____	_____	_____	_____
(name)	(telephone)		
_____	_____	_____	_____
(address)	(city)	(state)	(zip code)

2. DEFENDANT'S TRIAL COUNSEL (List all attorneys; use additional pages if needed):

_____	_____	_____	_____
(name)	(telephone)		
_____	_____	_____	_____
(address)	(city)	(state)	(zip code)
_____	_____	_____	_____
(name)	(telephone)		

(address)

(city)

(state)

(zip code)

THE COURT REPORTER SHALL IMMEDIATELY PREPARE THE ENTIRE RECORD AND TRANSMIT IT IN ACCORDANCE WITH RULE 10(a) OF THE ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL.

THIS NOTICE OF APPEAL MUST BE GIVEN WITHIN THE TIME SPECIFIED IN RULE 2(a) OF THE ARKANSAS RULES OF APPELLATE PROCEDURE — CRIMINAL.

I certify that I have served a copy of this notice of appeal on all parties or their representatives involved in the cause and on the court reporter by mailing a copy of the notice of appeal to the parties or their representatives, to the court reporter, and to the Attorney General on this _____ day of _____, 20____.

CIRCUIT COURT CLERK

(Amended July 6, 1981; adopted and amended July 10, 1995, effective January 1, 1996; amended January 13, 2000; amended July 9, 2001, effective for all cases in which the death penalty is imposed on or after August 1, 2001.)

Reporter’s Notes to Rule 10 (1995): This rule is former ARCrP 36.12, with grammatical changes and amended only by the addition of the last sentence to make it clear that stays are dissolved automatically when either the Arkansas Supreme Court or the United States Supreme Court affirms a judgment of death.

Addition to Reporter’s Notes, 2000 Amendment: The rule was clarified with regard to the dissolution of a stay of execution after the denial of post-conviction relief has been affirmed on appeal. (See Ark. R. Crim. P. 37.5 (g)(ii) for dissolution of stays of execution when there is no appeal.)

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES

ANALYSIS

Aggravating factors.
Application.
Conviction upheld.
Procedure.

Aggravating Factors.

Aggravating circumstance of an underlying robbery was not supported by the evidence because the evidence showed that defendant was attempting to recover money he had just lost to the victim by gambling. Daniels v. State, 373 Ark. 536, 285 S.W.3d 205 (2008).

Evidence supported the jury’s finding of a statutory aggravating circumstance or circumstances where the state offered substan-

tial evidence to support the argument that defendant robbed the victim of the contents of the cigar box for pecuniary gain and as to avoiding or preventing arrest, the jury could have concluded from the evidence that the victim was killed at least in part to preclude him from identifying defendant. Sales v. State, 374 Ark. 222, 289 S.W.3d 423 (2008), cert. denied — U.S. —, 129 S. Ct. 2000, 173 L. Ed. 2d 1098 (2009).

Application.

Because defendant’s death sentence was imposed prior to the amendment of this rule, which effectively codified the mandatory review in death cases provided in case law, the

court reviewed defendant's case under that case law. *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003).

Denial of defendant's motion for a brain injury examination did not deprive defendant of a basic tool for his defense as defendant was examined by a psychologist and he failed to object to the admission of the psychologist's report into evidence; defendant could not assert that failure to appoint a head-injury expert rose to the level of protection afforded by the third Wicks exception as (1) defendant was given an opportunity by the trial court to renew the motion for an appointment of the expert but he failed to do so, (2) it was not the trial court's duty to adequately prepare and present defendant's defense, and (3) defendant's argument could not be reviewed as an issue that fell within the purview of subdivision (b)(iv) of this rule because it was not a serious error requiring the trial court to intervene and issue an admonition or declare a mistrial. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006).

Conviction Upheld.

Supreme Court of Arkansas upheld defendant's conviction for the capital murder of an 87-year-old woman who was found shot to death in her yard where defendant confessed to the crime and the record of the guilt phase was reviewed for any prejudicial error under Ark. Sup. Ct. R. 4-3(h), § 16-91-113(a), and this rule, and none was found. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

Procedure.

In death-penalty cases, even if the defendant waives his personal right of appeal, the

Supreme Court will conduct an automatic review of the record for egregious and prejudicial errors. *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999).

Because defendant's judgment and commitment order sentencing defendant to death was entered on June 10, 2002, the court conducted a mandatory review of defendant's conviction pursuant to this rule. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

Unless the matters waived by defendant fell within one of the categories to be reviewed by the court on mandatory review of defendant's murder conviction and death sentence, the matters were not preserved for review because they constituted an adverse ruling where no objection was made below. *Newman v. State*, 353 Ark. 258, 106 S.W.3d 438 (2003).

In the fifth review of petitioner's case, the Supreme Court of Arkansas held that no S.Ct. Rule 4-3(h) errors, Wicks errors, or errors implicating "other fundamental safeguards" occurred during the trial; however, the Supreme Court could recall a mandate and reopen a case in "extraordinary circumstances," and did, where petitioner, relying on *Willett v. State*, asserted a deficiency in the verdict forms, and where a federal district court's dismissed petitioner's habeas corpus petition, in order to give state courts the opportunity to explore the issue. *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003); *Green v. State*, 365 Ark. 478, 231 S.W.3d 638 (2006).

Cited: *Thessing v. State*, 365 Ark. 384, 230 S.W.3d 526 (2006); *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264 (2010).

Rule 11. Proceedings on reversal.

Upon a mandate of reversal ordering a new trial being filed in the clerk's office of the circuit court in which the judgment of confinement in the penitentiary was rendered and executed, the clerk shall deliver to the sheriff a copy of the mandate and precept, authorizing and commanding him to bring the defendant from the penitentiary to the county jail, which shall be obeyed by the sheriff and keeper of the penitentiary. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 11 (1995): This rule is former ARCrP 36.14, with grammatical changes.

Rule 12. Deduction of confinement under prior conviction.

If the defendant upon the new trial is again convicted, the period of his former confinement in the penitentiary shall be deducted by the court from the period of confinement fixed in the last verdict of conviction. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 12 (1995): This rule is former ARCrP 36.15.

Rule 13. Judgment for costs.

On the affirmance of a judgment, where the appeal is taken by the defendant, and on the reversal of an appealable order where the appeal is taken by the state, a judgment for costs shall be rendered against the defendant. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 13 (1995): This rule is former ARCrP 36.16.

Rule 14. Matters to be considered on appeal.

The Supreme Court need only review those matters briefed and argued by the appellant, provided that where either a sentence for life imprisonment or death was imposed, the Supreme Court shall review the entire record for errors prejudicial to the right of the appellant. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 14 (1995): This rule is former ARCrP 36.24 altered only by grammatical changes.

RESEARCH REFERENCES

Ark. L. Rev. Note, Pharo v. State: Plain Error by Any Other Name?, 44 Ark. L. Rev. 779.

U. Ark. Little Rock L.J. Note, An Analysis

of Arkansas' Exceptional Treatment of the Contemporaneous Objection Rule in Criminal Bench Trials, 19 U. Ark. Little Rock L.J. 291.

CASE NOTES

ANALYSIS

In general.

Construction.

Abstract of objections.

Death sentence.

Duty of appellant and appellee.

Life imprisonment.

Objections.

Preservation of issues.

Reply brief.

Scope of review.

In General.

Appellate court generally will not consider errors raised for the first time on appeal, but certain exceptions to this rule are recognized, as in death-penalty cases where the appeals court will consider errors raised for the first time on direct appeal where prejudice is conclusively shown by the record and the court would unquestionably require the trial court to grant relief under ARCrP 37. Other matters that the court will review for the first time on appeal include instances where (1) error is made by the trial judge without knowledge of the defense counsel, (2) the trial

court should intervene on its own motion to correct a serious error, and (3) evidential errors affect a defendant's substantial rights although they were not brought to the court's attention; however the defendant must raise the issue of sufficiency of the evidence below. *Hughes v. State*, 295 Ark. 121, 746 S.W.2d 557 (1988).

The Arkansas Supreme Court is required by § 16-91-113 to review all errors prejudicial to the rights of the appellant in a case where a death sentence is imposed; this obligation is implemented through court procedure as outlined in this rule and Sup. Ct. & Ct. App. R. 4-3(h). *Gardner v. Norris*, 949 F. Supp. 1359 (E.D. Ark. 1996).

Construction.

Supreme Court Rule 11(f) (now Supreme Court and Court of Appeals Rule 4-3(h)) and ARCrP 36.24 (see now this rule) both require review of the record for error in life and death cases, but this review presupposes that an objection was made at trial. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

The Arkansas Supreme Court has repeat-

edly refused to interpret this rule and § 16-91-113 as absolving a party from making the appropriate contemporaneous objection at trial as a prerequisite to appellate review; the court has held that the Arkansas procedures requiring review of the record for error in life and death cases presupposes that an objection was made at trial. *Ruiz v. Norris*, 868 F. Supp. 1471 (E.D. Ark. 1994), *aff'd* 71 F.3d 1404 (8th Cir. 1995).

Abstract of Objections.

In appeal from a capital felony murder conviction in which the appellant was sentenced to life imprisonment without parole, it was the appellant's duty to abstract all objections that were decided adversely to her in the trial court. *Curry v. State*, 270 Ark. 570, 605 S.W.2d 748 (1980).

There may be parts of the record that are not pertinent to the appeal and need not be abstracted, such as the voir dire examination of each juror or pretrial rulings or testimony not relevant on appeal; if, however, objections were made during such parts of the proceeding, those objections should be abstracted in sequence as they appear in the record, and if counsel for the appellant deems it best not to abstract the record exactly according to the sequence of its numbered pages, appropriate explanations should be inserted for the benefit of the attorney general and the court. *Curry v. State*, 270 Ark. 570, 605 S.W.2d 748 (1980).

Death Sentence.

In capital murder cases where the appellant has been sentenced to death, the Supreme Court must examine the entire record not only as to those allegations of error raised on appeal, but also for any other errors prejudicial to the rights of the appellant. *Swindler v. State*, 267 Ark. 418, 592 S.W.2d 91 (1979), *cert. denied* 449 U.S. 1057, 101 S. Ct. 630, 66 L. Ed. 2d 511 (1980).

Generally, the Supreme Court will not consider errors raised for the first time on appeal; however, in death penalty cases the court will consider errors argued for the first time on direct appeal where prejudice is conclusively shown by the record and the court would unquestionably require the trial court to grant relief under ARCrP 37. *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284, *cert. denied* 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982).

Duty of Appellant and Appellee.

Even in capital cases, the Arkansas Supreme Court requires a defendant to have taken some action at trial to protect himself against perceived prejudice, and to point out those actions in the appeal; the State Attorney General, as appellee, has the duty of double-checking a defendant's work to make

sure all rulings adverse to the defendant are abstracted and briefed. *Gardner v. Norris*, 949 F. Supp. 1359 (E.D. Ark. 1996).

Life Imprisonment.

Where the appellant had been sentenced to life imprisonment without parole, it was the duty of both the counsel for the appellant and counsel for the state to examine the trial record page by page to be certain that all the objections are brought to the court's attention on appeal. *Curry v. State*, 270 Ark. 570, 605 S.W.2d 748 (1980).

Objections.

In order to be timely, an objection must be contemporaneous, or nearly so, with the alleged error; to preserve a point for appeal, a proper objection must be asserted at the first opportunity after the matter to which objection has been made occurs. *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997).

Where prosecutor's objectionable comments were made in the middle of his opening statement, but defendant did not object or move for a mistrial until the prosecutor had finished his entire opening statement, the motion for mistrial was untimely and thus did not preserve the issue for appeal. *Smith v. State*, 330 Ark. 50, 953 S.W.2d 870 (1997).

Preservation of Issues.

In the absence of a "plain error" rule, it is incumbent upon defendant to make a timely objection in the trial court to preserve the issue on appeal. *Pharo v. State*, 30 Ark. App. 94, 783 S.W.2d 64 (1990).

An objection contemporaneous to the introduction of prior convictions is a prerequisite to appellate review. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

If an issue is not raised below, it will be waived on appeal; even constitutional arguments are waived on appeal unless raised below. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

Even where issue on appeal affected a substantial right of the party, the procedural rules do not absolve the party at trial from making the appropriate objection as a prerequisite to appellate review. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

Reply Brief.

An argument cannot be raised for the first time in the reply brief. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

Scope of Review.

Examination of the record has been made in accordance with Ark. Sup. Ct. R. 4-3(h) and this rule, and it has been determined that there were no rulings adverse to defendant that constituted prejudicial error. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

Rule 15. Action to be taken on appeal.

A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution or the laws of Arkansas, or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed or affirmed as modified. (Adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 15 (1995): This rule is former ARCrP 36.25. The last sentence has been amended to explicitly recognize the

Supreme Court's authority to affirm a conviction as modified.

CASE NOTES**Affirmation.**

Supreme Court may not affirm a conviction at defendant's request when review mandates

reversal and remand. *Holt v. State*, 300 Ark. 300, 778 S.W.2d 928 (1989).

Rule 16. Trial counsel's duties with regard to appeal.

(a)(i) Trial counsel, whether retained or court-appointed, shall continue to represent a convicted defendant throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court or the appellate court to withdraw in the interest of justice or for other sufficient cause.

(ii) If no notice of appeal of a conviction has been filed with the trial court, the trial court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. A motion filed with the trial court to be relieved as counsel or a motion to the trial court for appointment of counsel shall clearly state that no notice of appeal has been filed with the trial court.

(iii) If a notice of appeal of a conviction has been filed with the trial court, the appellate court shall have exclusive jurisdiction to relieve counsel and appoint new counsel. A motion filed with the appellate court to be relieved as counsel or a motion filed with the appellate court for appointment of counsel shall clearly state that a notice of appeal has been filed with the trial court and shall further state the date on which the notice of appeal was filed.

(b) If court appointed counsel is permitted to withdraw in the interest of justice or for other sufficient cause in a direct appeal of a conviction or in an appeal in a postconviction proceeding under Ark. R. Crim. P. 37.5, new counsel shall be appointed promptly by the court exercising jurisdiction over the matter of counsel's withdrawal.

(c) If court appointed counsel is permitted to withdraw in the interest of justice or for other sufficient cause from an appeal in a postconviction proceeding other than a postconviction proceeding under Ark. R. Crim. P. 37.5, new counsel may be appointed in the discretion of the court exercising jurisdiction over the matter of counsel's withdrawal.

(d) If pursuant to Ark. Code Ann. § 16-13-506(b), the state has paid the court reporter for the transcript that is filed as part of the record with the appellate court and the defendant thereafter moves to substitute retained counsel for appointed counsel, the court may, as a condition of granting the motion, require the defendant to reimburse the state for the cost of the transcript. (Adopted and amended July 10, 1995, effective January 1, 1996;

amended January 13, 2000; amended December 12, 2002; amended February 22, 2007; amended May 27, 2010, effective July 1, 2010.)

Reporter's Notes to Rule 16 (1995): This rule is former ARCrP 36.26, amended to specify when the Supreme Court's authority to relieve counsel begins.

Addition to Reporter's Notes, 2000 Amendment: A sentence was added at the end of the rule to require the prompt appointment of substitute appellate counsel when the court permits the withdrawal of counsel.

Addition to Reporter's Notes, 2002 Amendment: The amendments divide the rule into subsections and add language making it clear that the court has discretion whether to appoint replacement counsel when

court appointed counsel is permitted to withdraw in a non-capital postconviction appeal.

Addition to Reporter's Notes, 2010 Amendment: Prior to the 2010 amendments, jurisdiction to relieve or appoint counsel turned on whether a notice of appeal had been filed with the trial court. The 2010 amendments added the requirement that a motion to be relieved as counsel or a motion for appointment of counsel must clearly state whether or not a notice of appeal has been filed with the trial court. Such a statement enables a court to determine that it has jurisdiction to grant or deny the motion.

1987 Unofficial Supplementary Commentary to former Rule 36.26 [now RAP-Crim 16]

The Arkansas Supreme Court has held that counsel for a convicted defendant is responsible for knowing about a notice of appeal filed pro se following a conviction, regardless of whether he is put on notice by his client or the court that the notice of appeal has been filed. *Gay v. State*, 288 Ark. 589, 707 S.W.2d 321 (1986).

Rule 36.26 must be read in conjunction with Arkansas Supreme Court Rule 11(h) in cases where counsel wishes to withdraw from a case. Trial counsel must obtain permission from the trial court or, pursuant to Rule 11(h), from the Supreme Court or the Court of Appeals, as the case may be. See *Blakely v.*

State, 279 Ark. 141, 649 S.W.2d 187 (1983); *Finnie v. State*, 265 Ark. 941, 582 S.W.2d 19 (1979); *Nelson v. State*, 279 Ark. 362, 651 S.W.2d 98 (1983).

Once trial counsel knows that a convicted defendant wishes to appeal, he must either file a notice of appeal or obtain permission from the trial court to withdraw as counsel. *Lewis v. State*, 279 Ark. 143, 649 S.W.2d 188 (1983). Counsel should also file a motion for permission to proceed as an indigent if it becomes clear that defendant cannot afford the cost of an appeal. *Lewis v. State*.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Derden, Survey of Arkansas Law: Criminal Procedure, 2 U. Ark. Little Rock L.J. 203.

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Construction.

This rule provides that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout appeal, unless permitted by the trial court or the Supreme Court to withdraw; once the notice of appeal is filed with the circuit clerk, under Sup. Ct. & Ct. App. Rule 4-3(j)(1), only the appellate court can relieve counsel of the obligation to proceed with the appeal. *Franklin v. State*, 317 Ark. 42, 875 S.W.2d 836 (1994).

Applicability.

Procedures for either filing appeal or withdrawing from case apply whether counsel is retained or appointed and must be followed when the defendant indicates he desires to

appeal. *Bogan v. State*, 293 Ark. 370, 738 S.W.2d 94 (1987).

Where counsel was never notified that the appellant desired to follow through with an appeal and the appellant was not indigent and therefore had made no showing that he was entitled to an appeal at public expense, there was no obligation on the part of counsel to comply with this rule. *Bogan v. State*, 293 Ark. 370, 738 S.W.2d 94 (1987).

This rule applies to appeals of orders denying post-conviction relief. *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989).

This rule applies to appeals of orders denying postconviction relief. *Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997).

Defendant counsel's petition for payment of attorney fees for his work on defendant's appeal, despite his employment as a full-time public defender, was denied because subsection (c) of this rule applies only to appointed counsel not otherwise paid, and this rule requires all counsel to represent defendants through their direct appeal unless relieved. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000).

Fact that the inmate's attorney did not perfect the appeal clearly indicated that he failed in his duty to the inmate; since there was no order dismissing the appeal or otherwise relieving the attorney from his obligation to perfect the appeal of the revocation of probation, the attorney was obliged to lodge the record in the appellate court and continue in his representation of the inmate until such time as the appellate court relieved him pursuant to S.Ct. Rule 4-3(j)(1). *Rogers v. State*, 353 Ark. 359, 107 S.W.3d 166 (2003).

Appointed Counsel.

The "interest of justice" did not require that one be relieved as counsel where animosity existed between defendant and the attorney, since that is not sufficient cause; a defendant has a right to an attorney on appeal, but he does not have a right to an attorney of his choosing. *Malone v. State*, 291 Ark. 315, 724 S.W.2d 180 (1987).

If a convicted defendant desires an appeal and cannot afford the cost, counsel should file a motion in the trial court to be relieved and a motion asking that the defendant be declared indigent and counsel appointed. *Parker v. State*, 303 Ark. 185, 792 S.W.2d 619 (1990).

The circuit court did not have authority to appoint an attorney as counsel for a defendant after the filing of a notice of appeal of an order denying relief under ARCrP Rule 37; instead, the Supreme Court had exclusive jurisdiction to relieve and appoint new counsel. *O'Brien v. State*, 334 Ark. 381, 974 S.W.2d 473 (1998).

When an appellate court allows court-appointed counsel to withdraw in an appeal of a denial of postconviction relief for sufficient

cause shown, the postconviction petitioner is not entitled to the appointment of new counsel. *Hammon v. State*, 347 Ark. 267, 61 S.W.3d 829 (2001), substituted opinion 65 S.W.3d 853 (2002).

It was not clear why the trial court did not appoint defendant an attorney after it permitted defendant's trial counsel to withdraw and noted that defendant was indigent, but in failing to do so, the trial court violated subsection (b) of this rule; the rule was clear and imposed a duty on the trial court that had to be complied with to ensure that a defendant was not denied a right to a first appeal. *Wrenn v. State*, 355 Ark. 558, 141 S.W.3d 362 (2004).

Defendant's motion for belated appeal was granted where, pursuant to subsection (a) of this rule, counsel had not been relieved by the trial court and was obligated to perfect the appeal and lodge the record in the appellate court; under § 19-4-1604(b)(2)(B), counsel was permitted to withdraw as attorney. *Wann v. State*, 369 Ark. 426, 255 S.W.3d 473 (2007).

While appellant's motion for rule on clerk was granted, a trial court erred in appointing appellate counsel where appellant's notice of appeal had already been filed by his trial counsel. If appellant wished to pursue an appeal without trial counsel, trial counsel had to file a motion to withdraw. *Vinson v. State*, 370 Ark. 282, 258 S.W.3d 726 (2007).

Because the second attorney filed a notice of appeal, the trial court lacked jurisdiction to grant the first attorney's subsequent motion to set aside the order appointing the second attorney as counsel; under subsection (a) of this rule, once the notice of appeal had been filed, which it had been, the appellate court had exclusive jurisdiction to relieve counsel and appoint new counsel. Therefore, because the first attorney was never properly appointed as appellant's counsel, she did not represent him and the supreme court was unable to consider a motion for rule on clerk filed by her at the current stage of the proceeding. *Sparacio v. State*, 371 Ark. 427, 266 S.W.3d 751 (2007).

After defendant filed a pro se notice of the appeal, the circuit court had no jurisdiction to relieve his appointed attorney; the Supreme Court of Arkansas had the exclusive jurisdiction to relieve and appoint counsel under subsection (a) of this rule. When the record on appeal was filed one day late due to court error, the appointed attorney was the correct person to file the motion for rule on clerk. *Hawthorne v. State*, 2009 Ark. 137, 296 S.W.3d 389 (2009).

Attorney of Record.

Where retained counsel filed appeal but did not pursue appeal despite defendant's wish that he do so, he remained attorney of record in light of his failure to follow the procedure prescribed under S. Ct. & Ct. App. Rule 4-3(h)

for withdrawal from a case; accordingly, motion by defendant to relieve such attorney as counsel would be denied and attorney would be required either to petition court for leave to withdraw or to file motion requesting permission to file record on appeal. *Nelson v. State*, 279 Ark. 362, 651 S.W.2d 98 (1983).

Where the record reflected that an appeal bond was set, from which it could be inferred that appellant knew he could appeal and desired to do so, counsel's claim that he could not recall appellant's asking him to appeal did not excuse him from pursuing the appeal; he therefore remained attorney-of-record and was responsible for representing appellant on appeal. *Wesson v. State*, 280 Ark. 98, 655 S.W.2d 401 (1983).

The fact that defendant's attorney failed to file a notice of appeal should not deprive the defendant of his right to appeal. *Davis v. State*, 317 Ark. 322, 877 S.W.2d 93 (1994).

The failure to perfect an appeal held attributable to the defendant's attorney of record, because he had not been relieved as counsel. *Davis v. State*, 317 Ark. 322, 877 S.W.2d 93 (1994).

Defense counsel was attorney of record, and continued to be such for purposes of appeal, where he had not been relieved as attorney of record, had not obtained permission from the trial court to withdraw before the notice of appeal was filed, and nor had he filed a motion to withdraw in the appellate court after the notice of appeal was filed. *Sanders v. State*, 330 Ark. 851, 956 S.W.2d 868 (1997).

An attorney remained counsel of record for a defendant, notwithstanding a circuit court order relieving him as counsel, where the order was not entered until after notice of appeal to the Supreme Court was filed. *Barr v. State*, 333 Ark. 576, 970 S.W.2d 243 (1998).

Ineffective Assistance of Counsel.

—In General.

Under no circumstances may an attorney who has not been relieved by the trial court abandon an appeal where he is aware within the thirty days allowed to file a notice of appeal that the convicted defendant desires to appeal simply because defendant has not paid for the transcript. *Mallett v. State*, 330 Ark. 428, 954 S.W.2d 247 (1997).

—Belated Appeals.

Where the attorney did not act to protect his client's right to appeal and showed no good cause for his failure to do so, a pro se motion for belated appeal should be granted. *Green v. State*, 276 Ark. 313, 634 S.W.2d 140 (1982).

Failure of counsel to perfect an appeal when a defendant desires one constitutes a denial of effective assistance of counsel and is a good cause for granting a belated appeal. *Burks v. State*, 328 Ark. 678, 945 S.W.2d 367 (1997).

—Filing Record.

An attorney may not simply tender the record in a criminal case in an untimely manner and take no further action; as an appellant should not be penalized for his attorney's failure to tender the record in accordance with the rules of procedure, the court granted a pro se motion for rule on the clerk. *Atkins v. State*, 308 Ark. 675, 827 S.W.2d 636 (1992).

—Not Shown.

Where the petitioner's counsel had not been fully paid for his services, had advised the petitioner of his right to appeal and sent the necessary papers to the petitioner, which the petitioner failed to use, the petitioner was not denied effective assistance of counsel and was not entitled to a belated appeal. *Houston v. State*, 263 Ark. 607, 566 S.W.2d 403 (1978).

Where the defendant's retained counsel knew that the defendant wanted to appeal, the attorney was obligated to file a notice of appeal or obtain permission from the trial court to withdraw. Therefore, where it was apparent from the attorney's affidavit that he neither withdrew from the case in accordance with this rule nor took any action to see that his client understood that as an indigent he could ask the trial court to appoint an attorney to perfect an appeal at public expense, the attorney's inaction amounted to the denial of the effective assistance of counsel and the defendant's pro se motion for a belated appeal would be granted. *Lewis v. State*, 279 Ark. 143, 649 S.W.2d 188 (1983); *Chandler v. State*, 297 Ark. 432, 762 S.W.2d 796 (1989).

A conflict with the jury trial of another client's felony charge was not sufficient cause to relieve an attorney from representation of a defendant in connection with his appeal where the appeal had already been filed. *Matthews v. State*, 333 Ark. 578, 970 S.W.2d 266 (1998).

—Shown.

Counsel's failure to file a notice of appeal was clearly deficient performance and constituted ineffective assistance of counsel where counsel did not seek to withdraw and did not inform defendant that he was entitled to appointed counsel for the purpose of appeal. *Easter v. Lockhart*, 773 F. Supp. 1226 (E.D. Ark. 1991).

Where defendant believed that the full record had been lodged on appeal by his original counsel, who was not in good standing at the time he represented defendant, defendant's new counsel's motion for entry of appearance was granted, a writ of certiorari was issued directing the court reporter to complete the transcript, and the original counsel was ordered to show cause why he should not be held in contempt. *Edwards v. State*, 359 Ark. 409, 198 S.W.3d 120 (2004).

Nolle Prosequi.

This rule does not require continued representation by defense counsel following the entry of a nolle prosequi order. *Butcher v. State*, 345 Ark. 222, 45 S.W.3d 378 (2001).

Notice of Desire to Appeal.

Where the evidence showed that the defendant wrote to his attorney several times within the 30-day period during which an appeal could have been initiated asking his attorney to appeal from the decision revoking his suspended sentence, but the attorney never perfected the appeal nor sought permission from the trial court to withdraw from the case, the defendant's pro se motion for a belated appeal would be granted, and since his attorney remained the attorney of record, the attorney would be held responsible for the duties on appeal imposed upon him by law. *Blakely v. State*, 279 Ark. 141, 649 S.W.2d 187 (1983).

Where appellant timely informed his attorney that he wished to appeal, counsel was obligated to continue to represent appellant in an appeal unless permitted by the trial court or the Supreme Court to withdraw and where counsel conceded that he did not appeal the convictions nor obtain permission to withdraw, appellant was entitled to a belated appeal. *Long v. State*, 280 Ark. 508, 660 S.W.2d 911 (1983).

The defendant was denied effective assistance of counsel and was entitled to a belated appeal, where his counsel failed to perfect an appeal and the defendant had showed that he desired an appeal by filing a pro se notice of appeal, even though he did not specifically notify his counsel that he had filed an appeal. *Gay v. State*, 288 Ark. 589, 707 S.W.2d 320 (1986).

Where petitioner filed a motion to proceed with a belated appeal pursuant to Ark. R. App. P. Crim. 2(e), the state supreme court could not decide the case without a remand to the trial court to make additional findings. There nothing in the record to show that petitioner requested that the public defender file an appeal within the required time period or that the public defender was relieved of his duties to represent petitioner on appeal in accordance with this rule. *M.H. v. State*, 373 Ark. 112, 281 S.W.3d 747 (2008).

Payment.

If the convicted defendant who is able to pay the costs of appeal desires an appeal but refuses to pay for it, counsel should ask to be relieved in the trial court; otherwise, he remains responsible for the appeal if it is determined that the defendant told him of her desire to appeal. *Browning v. State*, 287 Ark. 36, 697 S.W.2d 86 (1985).

Motion for belated appeal was granted because counsel was not entitled to abandon the

appeal solely because he was not paid. *Miller v. State*, 299 Ark. 548, 775 S.W.2d 79 (1989).

Defendant was entitled to a belated appeal where his original-attorney, who had not been relieved and had a continuing duty as trial counsel, failed to file an appeal, and his second counsel failed to file a timely notice of appeal because he had not received the full retainer that was required. *McDuffie v. State*, 307 Ark. 518, 826 S.W.2d 809 (1992).

Scope of Duty.

The right to counsel ends after the direct appeal of the original criminal trial is completed, and there is no obligation for counsel to continue representing the defendant in post-conviction proceedings which are undertaken in the Supreme Court after appeal. *Fretwell v. State*, 290 Ark. 221, 718 S.W.2d 109 (1986).

Even though petitioner filed an pro se amended Rule 37 petition and a pro se notice of appeal, his attorney had not been relieved and was thus obligated to continue representing him, which included lodging the Rule 37 record on appeal. *Sanders v. State*, 329 Ark. 363, 952 S.W.2d 133 (1997).

Although trial counsel continues to represent a convicted defendant through the appeal process, that representation does not continue after conviction if no appeal is taken, and terminates if the appeal concludes in an affirmance. *Cook v. State*, 59 Ark. App. 25, 952 S.W.2d 677 (1997).

Where trial counsel filed a notice of appeal, an order granted later on the same day which relieved him as counsel was not effective and he was obligated to perfect the appeal. *Thomas v. State*, 335 Ark. 262, 983 S.W.2d 122 (1998).

Where nothing in the record indicated that defendant's attorney had been relieved as counsel, he was responsible for filing the appeal in defendant's case. *Waddle v. State*, 356 Ark. 501, 156 S.W.3d 226 (2004).

Where defendant's counsel filed a notice of appeal, he was obligated to represent defendant until such time as he was permitted by the appellate court to withdraw pursuant to Ark. Sup. Ct. & Ct. App. R. 4-3(j)(1); because counsel failed to protect defendant's right to appeal, defendant was left without the effective appellate representation guaranteed to a convicted criminal defendant by the Sixth Amendment. *Holland v. State*, 358 Ark. 366, 190 S.W.3d 904 (2004).

Waiver of Right to Appeal.

A convicted defendant may waive his right to appeal by failure to inform counsel of his desire to appeal. *Conley v. State*, 286 Ark. 388, 691 S.W.2d 868 (1985); *Browning v. State*, 287 Ark. 36, 697 S.W.2d 86 (1985); *Jones v. State*, 294 Ark. 659, 748 S.W.2d 117 (1988).

Where the allegations of defendant and counsel were in direct conflict, defendant's request for belated appeal was denied, but the denial was without prejudice to her applying to the trial court for an evidentiary hearing on the question of whether she voluntarily waived her right to appeal by her failure to communicate to counsel her desire to appeal. *Browning v. State*, 287 Ark. 36, 697 S.W.2d 86 (1985).

Where petitioner, whose wife communicated to counsel her reasonable belief that petitioner did not want to appeal, contended that counsel should have consulted him rather than his wife but he failed to state that he personally took any step to inform counsel of his desire to appeal, he voluntarily waived his appeal right. *Gates v. State*, 287 Ark. 122, 696 S.W.2d 754 (1985).

Where counsel for defendant was not relieved by the trial court or Supreme Court, he was obligated to perfect an appeal, unless defendant waived his right to appeal by not informing him that he desired an appeal. *Parker v. State*, 303 Ark. 185, 792 S.W.2d 619 (1990).

Withdrawal.

Where attorney did not follow the procedure prescribed for withdrawal from a case, he would still be considered the attorney of record and would be held responsible for the duties imposed upon him by law, and where the attorney made a mistake in not timely filing an appeal, his client's motion for a belated appeal would be granted. *Ellis v. State*, 276 Ark. 560, 637 S.W.2d 588 (1982).

An attorney cannot abandon a convicted defendant merely because his appeal must be pursued at public expense. An attorney who wishes to withdraw from a case must obtain permission from the trial court to withdraw by means of a petition to withdraw containing a statement of reasons for withdrawing; a copy of the request for withdrawal, if granted, should be sent to his former client. *Lewis v. State*, 279 Ark. 143, 649 S.W.2d 188 (1983); *Bogan v. State*, 293 Ark. 370, 738 S.W.2d 94 (1987).

An attorney of record who fails to perfect an appeal must obtain permission to withdraw from the case or he will face a substantial risk of subsequently being held ineffective. *Plugge v. State*, 295 Ark. 513, 750 S.W.2d 52 (1988).

Before court would relieve counsel for criminal defendant from representation or appoint new counsel, because counsel claimed he lacked the financial resources to continue defendant's appeal, counsel would be required to present appropriate documentation, such as an affidavit of defendant's indigency and a statement supporting the reasons for his withdrawal. *James v. State*, 329 Ark. 58, 945 S.W.2d 941 (1997).

After an attorney filed a notice of appeal, he

was obligated to represent the appellant until such time as he was permitted by the appellate court to withdraw; an attorney appointed to the bench had a duty to lodge at least a partial record of the lower court proceedings in the appellate court with a motion asking to be relieved. *Stevens v. State*, 344 Ark. 168, 39 S.W.3d 758 (2001).

Attorney's motion to have a public defender relieved of the responsibility of representing defendant and to be substituted as counsel on defendant's criminal appeal was denied because the State Supreme Court could not determine from the motion whether defendant had been consulted regarding the change in counsel or whether he desired to be represented by different counsel in general, and by the attorney in particular; furthermore, the motion did not state the reasons for the attempted withdrawal, as required by the Court's rules of procedure and case law. *Jackson v. State*, 359 Ark. 248, 195 S.W.3d 926 (2004).

Counsel's motion to be relieved was properly brought to the court's attention because, pursuant to this rule, once a notice of appeal was filed, only the court had the power to relieve counsel, and this rule applied to appeals from adverse orders in proceedings under Ark. R. Crim. P. 37.1; the court granted counsel's motion and dismissed the appeal because it was clear that the inmate could not have prevailed on appeal. *Johnson v. State*, 362 Ark. 453, 208 S.W.3d 783 (2005).

Court denied public defender's motion to be relieved as counsel on appeal because this rule clearly states that there is no automatic right of withdrawal; the public defender failed to show that his motion should be granted in the interest of justice or for other sufficient cause. *Tice v. State*, 365 Ark. 410, 230 S.W.3d 557 (2006).

Where appellant's counsel had filed a notice of appeal, he was obligated to represent appellant until such time as he was permitted by the appellate court to withdraw. *Harden v. State*, 367 Ark. 364, 240 S.W.3d 103 (2006).

Where appointed counsel failed to show good cause for being removed as counsel in inmate's appeal of the denial of his post-conviction relief under Ark. R. Crim. P. 37.1 and essentially abandoned inmate's appeal, the court denied counsel's motion to withdraw under this rule. *Trowbridge v. State*, 368 Ark. 36, 242 S.W.3d 613 (2006).

Attorney's motion to withdraw as counsel was denied as the motion failed to offer any explanation of why sufficient cause existed to warrant the attorney's being relieved of his appellate duties as required by subsection (a) of this rule. *Barron v. State*, 368 Ark. 129, 243 S.W.3d 325 (2006).

Requirement of competent representation of a client's interest was not set aside simply

because counsel was of the opinion that an appeal of his client's case was wholly without merit; counsel's work in the appeal fell short of meeting his obligations under the rules of professional conduct and the Sixth Amendment to the United States Constitution. *Walton v. State*, 94 Ark. App. 229, 228 S.W.3d 524 (2006).

Where an attorney sought to withdraw from a criminal appeal on the grounds of a conflict of interest based on allegations that defendant had lodged a complaint against him with the Committee on Professional Conduct but the attorney did not attach the complaint to his motion, the court denied the motion under this rule. *Strong v. State*, 370 Ark. 87, 257 S.W.3d 80 (2007).

Supreme court denied counsel's request to withdraw as counsel for appellant because § 19-4-1604(a) indicated that counsel was eligible, as a part-time public defender, to receive compensation for his appellate work. Moreover, pursuant to subsection (a) of this rule, there was no automatic right of withdrawal, and counsel did not show that his motion should be granted in the interest of justice or for other sufficient cause. *Flowers v. State*, 370 Ark. 115, 257 S.W.3d 532 (2007).

Court denied appellate counsel's motion to withdraw on the basis that counsel was ineligible for compensation for any services performed on appeal because under § 19-4-1604(b)(2)(A), counsel was eligible to receive

compensation for the appellate work; it was irrelevant that the public defender's office employed two state-salaried secretaries. Counsel did not show that in the interest of justice or for other sufficient cause the motion should be granted, as required by subsection (a) of this rule. *Calhoun v. State*, 370 Ark. 367, 259 S.W.3d 455 (2007).

Court denied counsel's request to be relieved on the ground that continuing to represent defendant would cause counsel undue financial hardship or professional peril because defendant was indigent; defendant submitted an affidavit of financial means and an affidavit in support of a request to proceed in forma pauperis. *Evans v. State*, 370 Ark. 427, 260 S.W.3d 265 (2007).

In defendant's appeal from denial of motion for new trial, defense counsel was granted his request to withdraw pursuant to this rule because defendant based his motion on alleged ineffective assistance of counsel, putting defense counsel in a position where he would be expected to argue against his own effectiveness. *Rounsaville v. State*, 373 Ark. 194, 282 S.W.3d 759 (2008).

Cited: *Spillers v. State*, 341 Ark. 749, 19 S.W.3d 35 (2000); *Johnson v. State*, 342 Ark. 709, 30 S.W.3d 715 (2000); *Gooden v. State*, 344 Ark. 291, 40 S.W.3d 271 (2001); *Dugger v. State*, 351 Ark. 443, 94 S.W.3d 924 (2003); *Roy v. State*, 367 Ark. 178, 238 S.W.3d 117 (2006).

Rule 17. Time extension when last day for action on Saturday, Sunday or holiday.

Whenever the last day for taking any action under these rules or under the Rules of the Supreme Court and Court of Appeals falls on a Saturday, Sunday, or legal holiday, the time for such action shall be extended to the next business day. (Adopted May 5, 1980; adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 17 (1995): This rule is former ARAP 9.

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As the 30th day from the judgment fell on a Sunday, the time to file an appeal extended to the next day, Monday. *Bowen v. State*, 322

Ark. 483, 911 S.W.2d 555 (1995), cert. denied 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Rule 18. Uniform paper size.

All notices of appeal, motions, orders, records, transcripts, and other papers required or authorized by these rules shall be on an 8½" x 11" paper. (Adopted May 15, 1989; adopted and amended July 10, 1995, effective January 1, 1996.)

Reporter's Notes to Rule 18 (1995): This rule is former ARAP 10.

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Extension of time, AppCrim 17.

SENTENCING.

Affirmance of death sentence,
AppCrim 10.

SERVICE OF PROCESS.

Notice of appeal, AppCrim 2.

STATE, APPEAL BY, AppCrim 3.

Judgment for costs, AppCrim 13.

SUNDAY.

Extension of time, AppCrim 17.

T**TIME FOR FILING APPEAL,**

AppCrim 2.

Extension of time, AppCrim 17.

Record on appeal, AppCrim 4.

TRANSCRIPTS.

Appeal by state.

Filing transcript with clerk of
supreme court, AppCrim 3.

Certification of ordering, AppCrim
2.

Court-appointed counsel.

Reimbursement to state for cost of
transcript, AppCrim 16.

Death sentence appeals, AppCrim
10.

TRIAL COUNSEL.

Duties regarding appeal, AppCrim
16.

U

UNIFORM PAPER SIZE, AppCrim
18.

W**WITHDRAWAL OF
COURT-APPOINTED
COUNSEL.**

**From appeal or postconviction
proceeding, AppCrim 16.**

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SUPERSESSION RULE

All laws in conflict with the Arkansas Rules of Civil Procedure, Rules of Appellate Procedure and Rules for Inferior Courts shall be deemed superseded as of the effective dates of these rules.

CASE NOTES

Illustrative Case.

Section 16-17-213 has been superseded by AICR 9 [now ADCR 9]. Hawkins v. City of

Prairie Grove, 316 Ark. 150, 871 S.W.2d 357 (1994).

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RULES OF THE SUPREME COURT AND COURT OF APPEALS OF THE STATE OF ARKANSAS

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- 1-5. Contempt.
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- 6-4. Motion requesting disqualification.
- 6-5. Original actions.
- 6-6. Pauper's oath and motions for attorney's fees in criminal cases.
- 6-7. Taxation of costs.
- 6-8. Certification of questions of Law.
- 6-9. Rule for appeals in dependency-neglect cases.
- 6-10. Counsel's duties with regard to dependency-neglect appeals.

Publisher's Notes. By Per Curiam dated February 1, 1993, the Supreme Court adopted the following Rules of the Arkansas Supreme Court and Court of Appeals. The Per Curiam provided, in part, that "The following Rules of the Arkansas Supreme Court and Court of Appeals will replace the Rules of the Arkansas Supreme Court and Court of Appeals currently published in the Court Rules volume accompanying the Arkansas Code Annotated. The new Rules become effective May 1, 1993."

Case notes decided under the former rules have been moved to the pertinent new rule where they may be useful in interpreting the revised rule.

The prior Rules of the Arkansas Supreme Court and Court of Appeals had been adopted effective January 1, 1969.

Cross References. General statutes on appeals, § 16-67-302 et seq.

ARTICLE I. GENERAL RULES AND PROCEEDINGS

Rule 1-1. Hours and places of meeting.

The Supreme Court shall convene each Thursday at 9:00 a.m. and the Court of Appeals each Wednesday at 9:00 a.m., except during recess or as announced by either Court. The Supreme Court and the Court of Appeals shall convene in the Supreme Court and Court of Appeals Courtroom or at such other location as announced by either Court. (Amended June 30, 1997, effective September 1, 1997; amended October 14, 2002.)

Rule 1-2. Appellate jurisdiction of the Supreme Court and court of appeals.

(a) *Supreme Court jurisdiction.* All cases appealed shall be filed in the Court of Appeals except that the following cases shall be filed in the Supreme Court:

1. All appeals involving the interpretation or construction of the Constitution of Arkansas;
2. Criminal appeals in which the death penalty or life imprisonment has been imposed;
3. Petitions for quo warranto, prohibition, injunction, or mandamus directed to the state, county, or municipal officials or to circuit courts;
4. Appeals pertaining to elections and election procedures;
5. Appeals involving the discipline of attorneys-at-law and or arising under the power of the Supreme Court to regulate the practice of law;
6. Appeals involving the discipline and disability of judges;
7. Second or subsequent appeals following an appeal which has been decided in the Supreme Court; and
8. Appeals required by law to be heard by the Supreme Court.

(b) *Reassignment of cases.* Any case is subject to reassignment by the Supreme Court, and in doing so, the Supreme Court will consider but not be limited to the following:

- (1) issues of first impression,
- (2) issues upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
- (3) issues involving federal constitutional interpretation,
- (4) issues of substantial public interest,
- (5) significant issues needing clarification or development of the law, or overruling of precedent, and
- (6) appeals involving substantial questions of law concerning the validity, construction, or interpretation of an act of the General Assembly, ordinance of a municipality or county, or a rule or regulation of any court, administrative agency, or regulatory body.

(c) *Informational statement and jurisdictional statement.*

(1) The Informational Statement and Jurisdictional Statement in appellant's brief are for jurisdictional purposes only, and the discussion of the issues on appeal should be limited to their jurisdictional relevance, and not to argue their substantive merit.

(A) The Informational Statement which is to be contained within the brief, as provided in Rule 4-2(a)(2), shall be on a form which may be copied from that provided below and which shall be available from the Clerk.

(B) The Jurisdictional Statement, in narrative form, shall be completed on separate page(s), not to exceed three 8½" x 11" double-spaced, typewritten pages and shall comply with the provisions of Rule 4-1(a). All requested information shall be contained in the body of the Statement. No separate supporting materials shall be affixed. The attorney's signature may appear on a separate page at the end and shall not count against the three-page limit. The style of the case should not be stated, and, beginning with the first page, the Jurisdictional Statement shall contain in the order indicated:

(i) The first numbered paragraph which shall concisely state all issues of law raised on appeal. The issues should be expressed in the terms and circumstances of the case but without unnecessary detail.

(ii) The second numbered paragraph which shall state the following: "I express a belief, based on a reasoned and studied professional judgment, that this appeal raises (no) (the following) question(s) of legal significance for jurisdictional purposes:" Then, the appellant shall discuss as many of the issues listed in Rule 1-2(b) which are relevant to the appeal. Each issue should be stated with accuracy, brevity, and clarity, and should include the citations of any cases sought to be overruled or perceived to be in conflict.

(2) If a cross-appeal is filed, the cross-appellant shall include in his or her brief an Informational Statement and Jurisdictional Statement in the same format as that for the appellant limited to the issues raised by the cross-appeal.

(3) If there is substantial disagreement on the part of an appellee or cross-appellee with the information in the appellant's Jurisdictional Statement, the appellee or cross-appellee may include in the appellee's or cross-appellee's brief a statement entitled "Appellee's Response to Jurisdictional Statement", in which the appellee or cross-appellee may dispute or clarify any of the appellant's statements, concluding with the following certification. "I express a belief, based on a reasoned and studied professional judgment, that the statements made by the appellant in the appellant's Jurisdictional Statement to which I have taken exception are material to understanding correctly the nature of this appeal and its disposition in the appropriate appellate court." The page requirements for the appellee's response shall comply with the provisions of subsection (c) except that it shall not exceed two pages. The appellee's response shall not include an Informational Statement.

(d) *Transfer and certification.* The Supreme Court may transfer to the Court of Appeals any case appealed to the Supreme Court and may transfer to the Supreme Court any case appealed to the Court of Appeals. If the Court of Appeals seeks to transfer a case, the Court of Appeals shall find and certify that the case: (1) is excepted from its jurisdiction by Rule 1-2(a), or (2) otherwise involves an issue of significant public interest or a legal principle of major importance. The Supreme Court may accept for its docket cases so certified or may remand any of them to the Court of Appeals for decision. The Clerk of the Court shall notify the parties or their counsel of the transfer of any case.

(e) *Petition for review.* No appeal as of right shall lie from the Court of Appeals to the Supreme Court. The Supreme Court will exercise its discretion to review an appeal decided by the Court of Appeals only on application by a party to the appeal, upon certification of the Court of Appeals, or if the Supreme Court decides the case is one that should have originally been assigned to the Supreme Court. In determining whether to

grant a petition to review, the following, while neither controlling nor fully measuring the Supreme Court's discretion, indicate the character of reasons that will be considered: (i) the case was decided in the Court of Appeals by a tie vote, (ii) the Court of Appeals rendered a decision which is arguably in conflict with a prior holding of a published opinion of either the Supreme Court or the Court of Appeals, or (iii) the Court of Appeals arguably erred in some way related to one of the grounds listed in Rule 1-2(b).

(f) *Improper filing.* No case filed in either the Supreme Court or the Court of Appeals shall be dismissed for having been filed in the wrong court but shall be transferred or certified to the proper court.

(g) *Allocation of workload.* Notwithstanding the foregoing provisions, cases may be assigned and transferred between the courts by Supreme Court order to achieve a fair allocation of the appellate workload between the Supreme Court and the Court of Appeals.

(h) *[Exhaustion of remedies.]* In all appeals from criminal convictions or postconviction relief matters heard in the Court of Appeals, the appellant shall not be required to petition for rehearing in the Court of Appeals or review in the Supreme Court following an adverse decision of the Court of Appeals in order to be deemed to have exhausted all available state remedies respecting a claim of error. When the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the appellant shall be deemed to have exhausted all available state remedies. (Amended July 15, 1996, effective for cases in which the record is lodged on or after September 1, 1996; amended June 30, 1997, effective for cases in which the record is lodged on or after September 1, 1997; amended February 15, 2001, effective February 15, 2001; amended June 7, 2001, effective July 1, 2001; amended October 23, 2008, effective January 1, 2009.)

Publisher's Notes. The bracketed subsection heading in subsection (h) was added by the Publisher.

The Per Curiam of February 24, 1986, read: "By Act 231 of 1985 the General Assembly substituted the Court of Appeals for the Circuit Court as the first court to review a decision of the Public Service Commission.

"It might seem this act conflicts with Amendment 58 to the Arkansas Constitution, which created the Court of Appeals, and Rule 29 of the Rules of the Arkansas Supreme Court which sets the appellate jurisdiction of the Court of Appeals. We decide the appellate jurisdiction of the Court of Appeals, not the legislature. In Rule 29 1.d. we provided that we retain jurisdiction over appeals from orders of the Public Service Commission:

'[The Supreme Court shall hear] [cases appealed from orders of the Arkansas Transportation Commission, and the Arkansas Pollution Control Commission, and cases involving rates for public utilities fixed by municipal authorities; ...]

"In *Ward School Bus Mfg. v. Fowler*, 261 Ark. 100, 547 S.W.2d 394 (1977), we held that the General Assembly could not provide for direct appeals to this court from an order of the Workers Compensation Commission because we only have appellate jurisdiction un-

der Article 7, section 4 of the Arkansas Constitution, with certain exceptions not relevant here. But we determined in *Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980), that an act of the General Assembly providing for a direct appeal of an order of the Workers Compensation Commission to the Court of Appeals did not violate Amendment 58 to the Constitution because it was not an act determining *appellate* jurisdiction. We held Amendment 58 did not limit the Court of Appeals to appellate jurisdiction as Article 7, section 4 does this court. We found that the Court of Appeals was merely substituted for the Circuit Court as the first court to review an administrative order.

"In *Moose v. Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979), we laid out the ground rules for our review of decisions by the Court of Appeals. *Moose* involved a petition for review of a decision from Chancery Court. The criterion we described in *Moose* to determine review does not necessarily apply in cases in which the Court of Appeals acts as the first court to review an order of an administrative agency. In *Houston Contracting Co. v. Young*, *supra*, we noted that we cannot accept review of appeals from the Workers Compensation Commission until the Court of Appeals first makes a decision. The same is true of appeals

of decisions of the Board of Review of the Employment Security Division. Act 252 of 1979. We have not hesitated to grant review of the Court of Appeals' decisions in Workers Compensation or Employment Security cases when, in our judgment, the matter was of major legal importance or significant public interest.

"Utility rate decisions of the Public Service Commission are generally matters of significant public interest. We will therefore review by petition, or otherwise, decisions of the Court of Appeals with this in mind.

"While we respect the General Assembly's concern to expedite decisions of an administrative agency, we will not overlook the intent of Amendment 58 and our duty as an appellate court to see that any decision is fairly and completely reviewed once"

The Per Curiam order of the Supreme Court delivered on January 17, 1989, read: "It has come to our attention that on infrequent occasions it may be desirable for this court to have supplemental briefs in cases accepted for review from the Arkansas Court of Appeals. The need may arise, for example, when the court of appeals has based its decision on a matter not argued to it by the parties."

By Per Curiam dated July 15, 1996, the Supreme Court provided, in part, that effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 1996, and as more fully explained in the amended rules which follow [Sup. Ct. & Ct. App. Rules 1-2, 2-4, 4-2], it will be necessary for the appellant, at the time the appellant's brief is filed, to complete and file a "Cover Sheet and Jurisdictional Statement." The chief aim of these papers is to identify cases of legal significance and importance, irrespective of the category of the law, which should be decided in the Supreme Court. Each court shall review the information contained in the Cover Sheet and Jurisdictional Statement as a threshold matter to assess whether the appeal is filed in the proper court, and, if not, to promptly transfer or certify the case.

By Per Curiam dated Sept. 9, 1996, June 30, 1997, and October 23, 2008, effective January 1, 2009, the forms provided by the July 15, 1996, Per Curiam were amended to read as follows:

INFORMATIONAL STATEMENT

I. ANY RELATED OR PRIOR APPEAL (Identify)

II. BASIS OF SUPREME COURT JURISDICTION (see Rule 1-2(a))

() Check here if **no** basis for Supreme Court Jurisdiction is being asserted, *or* check below all applicable grounds on which Supreme Court Jurisdiction is asserted.

(1) _____ Construction of Constitution of Arkansas

- (2) _____ Death penalty, life imprisonment
- (3) _____ Extraordinary writs
- (4) _____ Elections and election procedures
- (5) _____ Discipline of attorneys
- (6) _____ Discipline and disability of judges
- (7) _____ Previous appeal in Supreme Court

(8) _____ Appeal to Supreme Court by law

III. NATURE OF APPEAL

- (1) _____ Administrative or regulatory action
- (2) _____ Rule 37
- (3) _____ Rule on Clerk
- (4) _____ Interlocutory appeal
- (5) _____ Usury
- (6) _____ Products liability
- (7) _____ Oil, gas, or mineral rights
- (8) _____ Torts
- (9) _____ Construction of deed or will
- (10) _____ Contract
- (11) _____ Criminal

[Write a brief statement limited to the space provided describing the case on appeal, and set out the causes of action (i.e., in a civil case, tort, contract, etc., or in a criminal case, the convicted offenses, whether felony or misdemeanor, and the punishment) underlying the judgment from which the appeal is taken.]

IV. IS THE ONLY ISSUE ON APPEAL WHETHER THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JUDGMENT?

V. EXTRAORDINARY ISSUES. (Check if applicable, and discuss in PARAGRAPH 2 of the Jurisdictional Statement.)

- () appeal presents issue of first impression,
- () appeal involves issue upon which there is a perceived inconsistency in the decisions of the Court of Appeals or Supreme Court,
- () appeal involves federal constitutional interpretation,
- () appeal is of substantial public interest,
- () appeal involves significant issue needing clarification or development of the law, or overruling of precedent.
- () appeal involves significant issue concerning construction of statute, ordinance, rule, or regulation.

VI. CONFIDENTIAL INFORMATION.

- (1) Does this appeal involve confidential information as defined by Sections III(A)(11) and VII(A) of Administrative Order 19?
_____ Yes _____ No
- (2) If the answer is "yes," then does this brief comply with Rule 4-1(d)?
_____ Yes _____ No

INSTRUCTIONS FOR JURISDICTIONAL STATEMENT

Counsel should keep in mind the Jurisdictional Statement is to be used for jurisdictional purposes only, and the discussion of the

issues on appeal should be limited to their jurisdictional relevance, and not to argue their substantive merit.

The Jurisdictional Statement pursuant to Rule 1-2(c) shall be completed on separate page(s), not to exceed three pages, and is subject to the provisions of Rule 1-2(c). All requested information shall be contained in the body of the Statement. No separate supporting materials shall be affixed. The style of the case should not be stated, and, beginning with the first page, it shall contain in the order indicated:

1. The first numbered paragraph shall concisely state all issues of law raised on appeal. They should be expressed in the terms and circumstances of the case but without unnecessary detail.

2. The second numbered paragraph shall state the following: "I express a belief, based on a reasoned and studied professional judgment, that this appeal raises (no) (the following) question(s) of legal significance for jurisdictional purposes." Then, the appellant shall explain each of the issues checked on PART V of the Informational Statement which are relevant to the appeal. Each issue should be

stated with accuracy, brevity, and clarity, and should include the citations of any cases sought to be overruled or perceived to be in conflict.

Reporter's Notes, 2001 Amendment: Subdivision (h) was added in response to language in *O'Sullivan v. Boerckel*, 526 U.S. 838, 119 S. Ct. 1728 (1999) ("[N]othing in our decision today requires the exhaustion of any specific state remedy when a State has provided that that remedy is unavailable. Section 2254(c), in fact, directs federal courts to consider whether a habeas petitioner has "the right under the law of the State to raise, by any available procedure, the question presented," ... The exhaustion doctrine, in other words, turns on an inquiry into what procedures are "available" under state law. In sum, there is nothing in the exhaustion doctrine requiring federal courts to ignore a state law or rule providing that a given procedure is not available.") *Id.*, 526 U.S. at 848. Petitions for review, which are discretionary under subdivision (e) of this rule, should not be required in order for a state prisoner to exhaust his state remedies.

RESEARCH REFERENCES

Ark. L. Rev. Lawrence, A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court, 37 Ark. L. Rev. 418.

Recent Developments, Alleviating Congestion in Arkansas Appellate Courts: Recent Changes in the Appellate Process, 51 Ark. L. Rev. 453.

U. Ark. Little Rock L.J. Powell, Survey of Workers' Compensation Law, 3 U. Ark. Little Rock L.J. 329.

Survey of Arkansas Law: Civil Procedure, 4 U. Ark. Little Rock L.J. 171.

Watkins, Division of Labor between Arkansas' Appellate Courts, 17 U. Ark. Little Rock L.J. 177.

Smith, The Influence of the Arkansas Supreme Court's Opinions on Policy Made by the General Assembly: A Case Study, 18 U. Ark. Little Rock L.J. 441.

CASE NOTES

ANALYSIS

In general.
Purpose.
Applicability.
Attorneys' lien statute.
Briefs.
Certification.
Certiorari.
Child custody.
Constitutional questions.
Court rules.
Criminal appeals.
Discipline of attorneys.
Discipline of judges.
Divorce.
Election contests.
Expunged records.
Federal habeas petitions.

Filing.
Interlocutory appeal.
Interpretation of acts, ordinances, rules or regulations.
Issue of first impression.
Issue of significant public interest.
Jurisdiction proper.
Legal principle of major importance.
Length of sentence.
Merits of appeal.
Paternity.
Practice of law.
Second or subsequent appeal.
Standard of review.
Workers' compensation.

In General.

Appellant's petition for writ of certiorari, filed pursuant to superseded S. Ct. Rule

29(6)(a), was treated as a petition for review under the current version, subsection (f) of this rule. *Hawkins v. City of Prairie Grove*, 316 Ark. 150, 871 S.W.2d 357 (1994).

Under U.S. Const., Amend. 58, which created the court of appeals, the Supreme Court, by rule, decides which court will have primary jurisdiction of appeals after an appeal has been validly lodged; this rule addresses that division of appellate jurisdiction and does not address the appealability of orders. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

The Supreme Court's jurisdiction is appellate in nature except where specific law or precedent has established authority for it to proceed in an original action. *Jackson v. Tucker*, 325 Ark. 318, 927 S.W.2d 336 (1996).

Where defendant was convicted of aggravated robbery and was sentenced to life imprisonment without parole, the Supreme Court of Arkansas had jurisdiction over his appeal pursuant to subdivision (a)(2) of this rule. *Porter v. State*, 359 Ark. 323, 197 S.W.3d 445 (2004).

Where the issue raised by the state's appeal concerned the trial court's authority to sentence a defendant to probation under the habitual criminal offender statute, the appellate court had jurisdiction as the issue was important to the correct and uniform administration of criminal law; further, the state may appeal the imposition of a void or illegal sentence by the trial court. *State v. Joslin*, 364 Ark. 545, 222 S.W.3d 168 (2006).

Arkansas Court of Appeals is not a court of last resort for purposes of obtaining certiorari review in the U.S. Supreme Court pursuant to Sup. Ct. R. 13.1 and 28 U.S.C.S. § 1257(a) because this rule makes it clear that the Arkansas Supreme Court retains to discretion to review any decision rendered by the state appeals court. Therefore, when a habeas petitioner has not sought review in the Arkansas Supreme Court, the 90 day period for filing for certiorari review in the U.S. Supreme Court is not considered when determining when the state appellate court's judgment becomes final for purposes of starting the one year imitations period set out in 28 U.S.C.S. § 2244(d)(1)(A). *Ben-Yah v. Norris*, 570 F. Supp. 2d 1086 (E.D. Ark. 2008).

In a case in which two insurance companies sought a writ of prohibition ordering a circuit court to dismiss the claims alleged against them in a proposed nationwide class action against numerous insurance companies, jurisdiction was properly in the Supreme Court of Arkansas. *Foremost Ins. Co. v. Miller County Circuit Court*, Third Div., 2010 Ark. 116, 361 S.W.3d 805 (2010).

Where an issue raised was one of first impression, the Supreme Court of Arkansas had jurisdiction to hear the matter pursuant

to subdivisions (b)(1) and (d)(2) of this rule. *Centennial Bank v. Tribuilt Constr. Group, LLC*, 2011 Ark. 245, — S.W.3d —, 2011 Ark. LEXIS 226 (June 2, 2011).

Arkansas Supreme Court's jurisdiction was pursuant to subdivision (a)(7) of this rule, because the case had previously been appealed to and decided by the Arkansas Supreme Court. *Middleton v. Lockhart*, 2012 Ark. 131, — S.W.3d —, 2012 Ark. LEXIS 154 (Mar. 29, 2012).

Purpose.

This rule, with such modifications as experience may suggest, is designed to carry U.S. Const., Amend. 58 into effect, ideally, the Supreme Court and the Court of Appeals will each have its own field of primary jurisdiction, ideally, each court will in effect be a court of last resort, with its decisions having a desirable finality, and ideally, it will be immaterial to the litigant whether his particular case goes to one court or to the other, for in either event both parties will have the benefit of an appellate review by a multi-judge court composed of judges having exactly the same qualifications. *Moose v. Gregory*, 267 Ark. 86, 590 S.W.2d 662 (1979) (decision under prior rule).

Under U.S. Const., Amend. 58, which created the court of appeals, and this rule, the Supreme Court of Arkansas decides the appellate jurisdiction of the court of appeals, not the legislature. *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 307 Ark. 171, 818 S.W.2d 935 (1991) (decision under prior rule).

Applicability.

The appealability of orders is governed by ARAP 2 and not this rule. *American Ins. Co. v. Cazort*, 316 Ark. 314, 871 S.W.2d 575 (1994).

Because defendant's appeal involved a challenge under the rape-shield statute, § 16-42-101, the court's jurisdiction was pursuant to § 16-42-101 and former subdivision (a)(8) of this rule. *Turner v. State*, 355 Ark. 541, 141 S.W.3d 352 (2004).

Where property owners alleged that an appraiser issued an intentionally false report and the appraiser moved for summary judgment, at issue was whether facts were stated to sufficiently support the tort of outrage; thus, the matter involved an issue of first impression and the Arkansas Supreme Court's jurisdiction was proper pursuant to this rule. *Marlar v. Daniel*, 368 Ark. 505, 247 S.W.3d 473 (2007).

Attorneys' Lien Statute.

Jurisdiction was in the Supreme Court under subdivision (1)(c) of the former rule where the case required an interpretation of the attorneys' lien statute. *Jarboe v. Hicks*, 281 Ark. 21, 660 S.W.2d 930 (1983) (decision under prior rule).

Briefs.

Where record of case had not been abstracted, the case was remanded and the attorneys directed to properly abstract and brief case; briefs were due pursuant to this rule as though the transcript were lodged on the day of the order of remand. *Munnerlyn v. State*, 293 Ark. 240, 736 S.W.2d 287 (1987) (decision under prior rule).

Certification.

Jurisdiction of the appeal was proper, pursuant to former subdivision (a)(16) and present subsection (d) of this rule, respectively, where the appeal raised a question about the law of torts and was certified to the Supreme Court by the Court of Appeals. *Martin Farm Enters., Inc. v. Hayes*, 320 Ark. 205, 895 S.W.2d 535 (1995).

The Court of Appeals certified an appeal from a case involving the Fair Credit Reporting Act to the Arkansas Supreme Court pursuant to subsection (d) of this rule under the belief that the case presented a question about the law of torts and, therefore, was excepted from the Court of Appeals jurisdiction under former subdivision (a)(16) of this rule; however, the Supreme Court declined to accept the case and remanded it for a Court of Appeals decision. *Trans Union Corp. v. Crisp*, 49 Ark. App. 76, 896 S.W.2d 446 (1995).

Jurisdiction of the Supreme Court of Arkansas was pursuant to subdivisions (b)(1), (4), and (6) of this rule because the case was certified to the supreme court by a court of appeals for a determination whether that court erred in issuing a particular order. *Ark. HHS v. Storey*, 372 Ark. 23, 269 S.W.3d 803 (2007).

Certiorari.

Appellants who sought certiorari first and were denied that writ could not then appeal. *Henderson Methodist Church v. Sewer Imp. Dist. No. 142*, 294 Ark. 188, 741 S.W.2d 272 (1987) (decision under prior rule).

Child Custody.

While a tie-vote by the Court of Appeals may be a ground for Supreme Court review of a decision of the Court of Appeals, it is not an automatic reason to grant review, and where the sole question presented was custody of the parties' child, review would be denied. *Perkins v. Perkins*, 267 Ark. 112, 589 S.W.2d 29 (1979) (decision under prior rule).

The Arkansas Supreme Court has jurisdiction of a child custody petition where relief in the form of mandamus was requested. *Glover v. Shirron*, 314 Ark. 226, 861 S.W.2d 110 (1993).

Because the Supreme Court had decided a previous appeal involving the parties, review of a child custody order was granted pursuant to former subdivisions (a)(11) and (f)(1) of this

rule. *Jones v. Jones*, 326 Ark. 481, 931 S.W.2d 767 (1996), questioned *Mason v. Mason*, 111 S.W.3d 855 (2003).

Constitutional Questions.

Where appellant sought to invoke the jurisdiction of the Supreme Court by generalized contentions that his constitutional rights were violated, such contentions were insufficient under subdivision (1)(a) of the former rule to invoke jurisdiction. *Collier v. Hot Springs Sav. & Loan Ass'n*, 272 Ark. 162, 612 S.W.2d 730 (1981) (decision under prior rule).

The Supreme Court had jurisdiction of the appeal in a criminal matter, despite the fact that defendant's term of incarceration was 30 years, where the constitutionality of an act of the General Assembly was called into question. *Watkins v. State*, 320 Ark. 163, 895 S.W.2d 532 (1995).

Supreme Court jurisdiction was proper pursuant to subdivision (a)(3) of this rule because case questioned the interpretation or construction of former ARCrP 36.10(c) and Ark. Code Ann. § 5-1-110(c) (Repl. 1993). *State v. Jones*, 321 Ark. 451, 903 S.W.2d 170 (1995).

Court had jurisdiction under subdivision (a)(1) of this rule because the case, which involved taxing benefits paid under a retirement plan under § 26-51-307, required the interpretation or construction of the Arkansas Constitution. *Weiss v. McFadden*, 353 Ark. 868, 120 S.W.3d 545 (2003).

Court Rules.

This rule requires that all cases involving the construction or interpretation of a rule or regulation of any court be decided by the Supreme Court. *Aldridge v. Watling Ladder Co.*, 275 Ark. 225, 628 S.W.2d 322 (1982) (decision under prior rule).

Jurisdiction to interpret the Rules of Civil Procedure is in the Supreme Court. *May v. Barg*, 276 Ark. 199, 633 S.W.2d 376 (1982) (decision under prior rule).

The Arkansas Supreme Court found that review was necessary even though the state had not filed a motion for certiorari before the case was submitted to the Court of Appeals where the case was one of major importance, the Court of Appeals was divided on whether the case should have been sent to the Supreme Court, the Court of Appeals had to choose whether to apply two recent United States Supreme Court cases or the Arkansas Rules of Criminal Procedure and the United States Supreme Court decisions were not rendered until after the state had filed its briefs. *State v. Anderson*, 284 Ark. 509, 683 S.W.2d 897 (1985) (decision under prior rule).

Where case did not involve the interpretation or construction of a procedural rule, there was no need for certification. *Planters Bank & Trust Co. v. Smith*, 52 Ark. App. 53, 914 S.W.2d 765 (1996).

Criminal Appeals.

Where three eyewitnesses testified and identified defendant as the person who fired the shot that killed the victim, he was convicted of capital murder and sentenced to life imprisonment without parole plus ten years. The Supreme Court of Arkansas had jurisdiction over his appeal pursuant to subdivision (a)(2) of this rule. *Page v. State*, 2009 Ark. 112, 313 S.W.3d 7 (2009).

Discipline of Attorneys.

Contempt cases involving attorneys were matters within the jurisdiction of the Arkansas Supreme Court under subdivision (1)(h) of the former rule. *McCullough v. Lessenberry*, 27 Ark. App. 127, 769 S.W.2d 420 (1989) (decision under prior rule).

Discipline of Judges.

After the Arkansas Judicial Discipline and Disability Commission held a hearing and issued a Letter of Admonishment, the judge was required to appeal the matter to the Arkansas Supreme Court, as provided for by subdivision (a)(6) of this rule, and the judge's action filed in the federal district court could not be heard because the federal district court did not have jurisdiction when the matter was one of state concern and the Arkansas Supreme Court should have been able to address the constitutional issues raised by the judge. *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 266 F. Supp. 2d 898 (E.D. Ark. 2003).

Divorce.

When the words "Supreme Court" appear in the Rules of Appellate Procedure, one must substitute the words "Court of Appeals" in cases where the appellate jurisdiction is in that court. *Morgan v. National Pizza Co.*, 285 Ark. 61, 684 S.W.2d 812 (1985) (decision under prior rule).

Court of appeals has jurisdiction and authority to award attorneys' fees in divorce actions. *Elkins v. Coulson*, 293 Ark. 539, 739 S.W.2d 675 (1987) (decision under prior rule).

Election Contests.

Arkansas Supreme Court had jurisdiction under subdivision (a)(4) of this rule, because the appeal pertained to elections and election procedures. *Oliver v. Phillips*, 375 Ark. 287, 290 S.W.3d 11 (2008).

Expunged Records.

In a case where an issue of first impression was raised relating to expunged records, the Arkansas Supreme Court had jurisdiction. *Jones v. Huckabee*, 369 Ark. 42, 250 S.W.3d 241 (2007).

Federal Habeas Petitions.

One year limitations period set out in 28 U.S.C.S. § 2244(d)(1)(A) began to run when

an Arkansas appeals court issued its mandate denying petitioner inmate's direct criminal appeal. The limitations period's start date was not extended by 90 days, to allow for the filing a writ of certiorari to the U.S. Supreme Court because the appeals court's decision was not a decision rendered by the highest state court, as pursuant to this rule, the Arkansas Supreme Court retained discretion to review state appeals court decision, and therefore the appeals court's decision was not subject to U.S. Supreme Court review under 28 U.S.C.S. § 1257(a) and Sup. Ct. R. 13.1. *Ben-Yah v. Norris*, 570 F. Supp. 2d 1086 (E.D. Ark. 2008).

Because the grounds for review listed in subsection (b) of this rule and Ark. Sup. Ct. & Ct. App. R. 2-4(c) were not exhaustive, and Ark. Sup. Ct. & Ct. App. R. 2-4 did not impose an "affirmative duty" on prisoners to appeal to the Arkansas Supreme Court in any situation, the Arkansas Court of Appeals was not the "state court of last resort" in petitioner's case, and the U.S. Supreme Court could not have reviewed either the Arkansas Court of Appeals' affirmance of petitioner's conviction or denial of his motion for rehearing; accordingly, the expiration of time for seeking direct review did not include the time period that petitioner could have filed a petition for certiorari, and his 28 U.S.C.S. § 2254 petition for habeas corpus relief was correctly dismissed as untimely. *Parmley v. Norris*, 586 F.3d 1066 (8th Cir. 2009).

Filing.

Where defendant handed his handwritten motion to the judge in open court and the judge accepted the motion, reviewed it, and ruled on its merits, under Arkansas practice, that should constitute "filing." *Forgy v. Norris*, 64 F.3d 399 (8th Cir. 1995).

Interlocutory Appeal.

A certification pursuant to ARCP 54(b) does not fall within any of the interlocutory appeal categories in former subdivision (a)(12) of this rule; hence, an independent basis for jurisdiction in the supreme court under the supreme court rule is lacking. *Davis v. Wausau Ins. Cos.*, 315 Ark. 330, 867 S.W.2d 444 (1993).

Where an interlocutory appeal is permitted by § 9-27-318(h), jurisdiction is properly in the Supreme Court under former subdivision (a)(12) of this rule. *Sebastian v. State*, 318 Ark. 494, 885 S.W.2d 882 (1994).

Arkansas Supreme Court's jurisdiction was proper pursuant to subdivision (a)(8) of this rule, because the appeal for the order certifying the class was an interlocutory appeal pursuant to Ark. R. App. P. Civ. 2(a)(9). *FirstPlus Home Loan Owner 1997-1 v. Bryant*, 372 Ark. 466, 277 S.W.3d 576 (2008).

Interpretation of Acts, Ordinances, Rules or Regulations.

An order setting aside the judgment against a garnishee was appealable to the Supreme Court only because the appeal involved the interpretation or construction of § 16-58-125 which establishes the requirements for services of process upon a corporate agent at a branch office. *Morgan v. National Pizza Co.*, 285 Ark. 61, 684 S.W.2d 812 (1985) (decision under prior rule).

Where a defendant convicted of per se violating the statute proscribing driving while intoxicated claimed on appeal that there was no evidence presented to support a conviction under the clear standard of criminal conduct set forth in the statute and that the trial court failed to interpret the statute in a manner so as to avoid grave and doubtful constitutional questions, the appeal was an issue of first impression and involved a substantial question of law concerning the construction and interpretation of an act of the General Assembly; hence, the court on appeal had jurisdiction pursuant to subdivisions (b)(1) and (6) of this rule. *Bramlett v. State*, 356 Ark. 200, 148 S.W.3d 278 (2004).

Supreme Court of Arkansas assumed jurisdiction of the appeal of a suit involving the interpretation of a trust agreement because the suit also required the court to consider the proper manner for determining the amount of a supersedeas bond pursuant to Ark. R. Civ. P. 62. *Bailey v. Delta Trust & Bank*, 359 Ark. 424, 198 S.W.3d 506 (2004).

State inmate could have petitioned the United States Supreme Court for writ of certiorari without first petitioning the Arkansas Supreme Court where he raised only one issue, i.e., whether the circuit court erred by refusing to exclude certain evidence, and, as a result, the inmate raised no issue that invoked the jurisdiction of the Supreme Court of Arkansas under this rule. *Collier v. Norris*, 402 F. Supp. 2d 1026 (E.D. Ark. 2005).

Where parties to the divorce disputed whether the child's middle name was properly changed by the trial court, the case was certified to the Supreme Court of Arkansas as an issue requiring clarification or development of the law; hence, the Court's jurisdiction was pursuant to subdivision (b)(5) of this rule. *Poindexter v. Poindexter*, 360 Ark. 538; 203 S.W.3d 84 (2005).

Where police chief sued mayor alleging a violation of the Arkansas Civil Rights Act of 1993, § 16-123-101et seq., for retaliatory discharge in violation of the right to freedom of speech under Ark. Const., Art. 2, § 6, the Supreme Court of Arkansas had jurisdiction to hear the case, pursuant to subdivision (a)(1) of this rule, as it involved the interpretation of the Arkansas Constitution. *Smith v. Brt.*, 363 Ark. 126, 211 S.W.3d 485 (2005).

Where an employee challenged a plan administrator's decision to terminate disability benefits, the supreme court assumed the case from the court of appeals under subdivision (b)(5) of this rule because Arkansas state courts rarely heard cases involving the Employee Retirement Income Security Act, 29 U.S.C.S. §§ 1001-1461, and the case involved an area of the law in need of clarification. *Selmon v. Metro. Life Ins. Co.*, 372 Ark. 420, 277 S.W.3d 196 (2008).

Issue of First Impression.

Arkansas Supreme Court's jurisdiction was pursuant to subdivision (b)(1) of this rule, in the appeal filed by the company challenging the circuit court's denial of its motion to set aside a decree of foreclosure and to dismiss the foreclosure action, because the case presented an issue of first impression. *Mortgage Elec. Registration Sys. v. Southwest Homes of Ark.*, 2009 Ark. 152, 301 S.W.3d 1 (2009).

Private employer's appeal of a decision of the Arkansas Board of Review, which found that an employee was eligible for unemployment compensation benefits under § 11-10-509, presented a question of first impression with regard to the Arkansas unemployment statutes; therefore, jurisdiction was properly in the supreme court pursuant to subdivisions (b)(1) and (e)(iii) of this rule. *SubTeach USA v. Williams*, 2010 Ark. 400, — S.W.3d —, 2010 Ark. LEXIS 494 (Oct. 28, 2010).

Issue of Significant Public Interest.

The question of the application of the statute of limitations provided by § 11-9-702 when compensation for disability on account of an injury has been paid to the claimant under the laws of a sister state involves an issue of significant public interest on a legal principle of major importance and was, excepted from jurisdiction of the Court of Appeals under subdivision (1)(c) of the former rule. *Houston Contracting Co. v. Young*, 267 Ark. 44, 589 S.W.2d 9 (1979) (decision under prior rule).

Where the appellant's jurisdictional statement in a notice of appeal from a chancery court final decree did not invoke Supreme Court jurisdiction under any part of subdivision (1) the former rule, but instead petitions the Supreme Court to accept the case under subdivisions (3) and (4) of the former rule as presenting an issue of significant public interest or a legal principle of major importance, the case had to be transferred to the Court of Appeals for further proceedings since the jurisdictional question must be decided in the first instance by the Court of Appeals, not by counsel nor by the clerk of the court, and since all cases shall be appealed to the Court of Appeals except those falling within the jurisdiction of the Supreme Court, as defined in the various parts of subdivision (1) of the

former rule. *White v. White, Inc.*, 273 Ark. 476, 621 S.W.2d 215 (1981) (decision under prior rule).

Case involving what constitutes an acceptance of a renewal notice for an insurance contract was certified from the court of appeals pursuant to subdivision (d)(2) of this rule as a case of significant public interest involving a legal issue of major importance. *Equity Fire & Cas. Co. v. Traver*, 330 Ark. 102, 953 S.W.2d 565 (1997).

Supreme Court of Arkansas's jurisdiction over an appeal was pursuant to subdivision (b)(5) of this rule as the appeal presented significant issues needing clarification or development of the law. *City of Fort Smith v. Didicom Towers, Inc.*, 362 Ark. 469, 209 S.W.3d 344 (2005).

Appellate court had jurisdiction to hear individual's appeal from the circuit court's order denying his motion to vacate his conviction because the case involved an issue of substantial public interest. *Barnett v. State*, 366 Ark. 427, 236 S.W.3d 491 (2006).

Because a case involving the revocation of a physician's license to practice medicine concerned an issue of first impression and substantial public interest, the Supreme Court of Arkansas assumed jurisdiction pursuant to subdivisions (b)(1) and (4) of this rule. *Collie v. Ark. State Med. Bd.*, 370 Ark. 180, 258 S.W.3d 367 (2007).

Where a boy was shot in the eye by a paint ball fired from a vehicle, the circuit court found that his injuries were excluded from coverage under a homeowner's insurance policy and an automobile insurance policy. The guardian's appeal of the circuit court's order granting summary judgment was certified to the Supreme Court of Arkansas from the Arkansas Court of Appeals, because the case involved an issue of substantial public interest and a significant issue needing clarification or development of the law pursuant to subdivisions (b)(4) and (5) of this rule. *Deschner v. State Farm Mut. Auto. Ins. Co.*, 375 Ark. 281, 290 S.W.3d 6 (2008).

Jurisdiction Proper.

Arkansas Supreme Court's jurisdiction was pursuant to subdivision (b)(5) of this rule, because the case involved a significant issue needing clarification and development of the law regarding judicial review of an agency's decision. *Fatpipe, Inc. v. State*, 2012 Ark. 248, — S.W.3d —, 2012 Ark. LEXIS 268 (May 31, 2012).

Legal Principle of Major Importance.

Where Court of Appeals in deciding Employment Security Act cases found only that the employment security board's findings were not supported by substantial evidence, but did not either abolish or alter the substantial evidence rule, there was no "legal princi-

ple of major importance" which entitled petitioners to review in the Supreme Court under this rule since petitioners were simply seeking a second appellate review, contrary to the Supreme Court's position that the Court of Appeals is not a purely intermediate court, but has a separate area of jurisdiction from the Supreme Court. *Daniels v. Bennett*, 272 Ark. 275, 613 S.W.2d 591 (1981) (decision under prior rule).

The fact that a significant issue may be involved is not sufficient, in itself, for the appellate court to accept jurisdiction of an interlocutory appeal. *Scheland v. Childres*, 313 Ark. 165, 852 S.W.2d 791 (1993) (decision under prior rule).

Length of Sentence.

The Supreme Court of Arkansas has jurisdiction over appeals in cases in which defendant was sentenced to 60 years in prison. *Smith v. State*, 313 Ark. 93, 852 S.W.2d 109 (1993).

Where defendant had been sentenced to life for the rape of his daughter, the appellate court had jurisdiction to hear his appeal. *Terry v. State*, 366 Ark. 441, 236 S.W.3d 495 (2006).

Where defendant was sentenced to a term of life imprisonment following his conviction for aggravated robbery, the appellate court had jurisdiction to hear his appeal pursuant to this rule. *McEwing v. State*, 366 Ark. 456, 237 S.W.3d 43 (2006).

Merits of Appeal.

Court first considered this case to decide a jurisdictional issue, and pursuant to subdivision (a)(7) of this rule, the case was back before the court for a consideration of the merits on appeal. *Myers v. Yingling*, 372 Ark. 523, 279 S.W.3d 83 (2008).

Paternity.

This rule permits interlocutory appeals, and ARAP 2(a) specifies those orders that are appealable; none of the categories for interlocutory orders from which appeals may be taken under ARAP 2(a) embrace an order for paternity blood tests and therefore an appeal from such an order is premature. *Scheland v. Childres*, 313 Ark. 165, 852 S.W.2d 791 (1993) (decision under prior rule).

Practice of Law.

The adequacy of an attorney's fee falls well within the ambit of the practice of law over which the Supreme Court has general supervisory authority. *Price v. State*, 313 Ark. 96, 852 S.W.2d 107, reh'g denied, 313 Ark. 98A, 856 S.W.2d 10 (1993).

Second or Subsequent Appeal.

Where appellant was convicted of the first degree murder of his wife and sentenced to life imprisonment, on appeal the conviction

was reversed and remanded, and upon retrial, he was again convicted of first degree murder, but this time was sentenced to 25 years in prison, even though the sentence was less than that required for appellate jurisdiction in the Supreme Court, the court exercised jurisdiction pursuant to former subdivision (a)(11) of this rule, because this was a subsequent appeal of a case initially decided by the Supreme Court. *Larimore v. State*, 317 Ark. 111, 877 S.W.2d 570 (1994).

Supreme Court of Arkansas court had jurisdiction over class certification pursuant to subdivision (a)(7) of this rule because this was a subsequent appeal following an appeal previously decided by this court. *Baptist Health v. Hutson*, 2011 Ark. 210, — S.W.3d —, 2011 Ark. LEXIS 197 (May 12, 2011).

Standard of Review.

When the Supreme Court reviews a decision of the Court of Appeals under subsection (f) of this rule, the case is reviewed as though it had been originally filed in the Supreme Court. *Maloy v. Stuttgart Mem. Hosp.*, 316 Ark. 447, 872 S.W.2d 401 (1994); *Johnson v. State*, 319 Ark. 78, 889 S.W.2d 764 (1994).

Workers' Compensation.

The Court of Appeals could, and should, upon its own motion, certify to the Supreme Court any appeal it finds to be excepted from its jurisdiction by former Rule 29 of the Rules of the Supreme Court and Court of Appeals or to involve an issue of significant public interest or a legal principle of major importance, but if the case had been appealed to the Court of Appeals from the Workers' Compensation Commission under § 11-9-704(b), the case could not have been certified or transferred to this court prior to a decision having been made by the Court of Appeals. *Houston Contracting Co. v. Young*, 267 Ark. 44, 589 S.W.2d 9 (1979); *Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980) (decision under prior rule).

Subdivision 1.j. of the former rule cannot possibly deprive the Court of Appeals of jurisdiction of an appeal from the Worker's Compensation Commission, as the jurisdiction of the Court of Appeals from the Worker's Compensation Commission is not a part of the appellate jurisdiction of that court assigned to it by the Supreme Court pursuant to U.S. Const., Amend. 58, but original jurisdiction conferred upon that court by Acts 252 and 253 of the General Assembly of 1979. *Houston Contracting Co. v. Young*, 271 Ark. 455, 609 S.W.2d 895 (1980) (decision under prior rule).

Supreme Court granted certiorari to consider whether the Court of Appeals had correctly interpreted § 11-9-801 et seq. *Buckeye Cotton Oil v. McCoy*, 272 Ark. 272, 613 S.W.2d 590 (1981) (decision under prior rule).

Cases involving the interpretation and con-

stitutionality of workers' compensation statutes are appealable to the Court of Appeals. *Hamilton v. Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987) (decision under prior rule).

Court of appeals was obliged to decide constitutional questions raised in workers' compensation case and had no authority to make improper factual determination in order to avoid the constitutional issues. *Hamilton v. Jeffrey Stone Co.*, 293 Ark. 499, 739 S.W.2d 161 (1987) (decision under prior rule).

Normally, after an appeal has been decided in the Supreme Court, subsequent appeals are to be filed in the Supreme Court pursuant to former subdivision (a)(11) of this rule, however, because of constitutional limitations upon the appellate jurisdiction of the Arkansas Supreme Court, that rule cannot possibly deprive the court of appeals of jurisdiction of an appeal from the Workers' Compensation Commission. *Cagle Fabricating & Steel, Inc. v. Patterson*, 42 Ark. App. 168, 856 S.W.2d 30 (1993).

Supreme Court reviews a decision of the Arkansas Court of Appeals under subsection (f) of this rule as though the case had been originally filed in this court; thus for an appeal of a workers' compensation case from the Court of Appeals to the Supreme Court, the Supreme Court view the evidence in the light most favorable to the Commission's decision and affirm that decision if it is supported by substantial evidence and will reverse the Commission's decision only if convinced that fair-minded persons considering the same facts could not have reached the conclusion made by the Commission. *Kuhn v. Majestic Hotel*, 324 Ark. 21, 918 S.W.2d 158 (1996).

Cited: *First Sec. Bank v. Estate of Leonard*, 369 Ark. 213, 253 S.W.3d 434 (2007). *Yarborough v. State*, 369 Ark. 280, 253 S.W.3d 464 (2007). *Williams v. Coca-Cola Bottling Co.*, 266 Ark. 736, 585 S.W.2d 372 (1979); *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980); *Chandler Trailer Convoy, Inc. v. Henson*, 266 Ark. 760, 585 S.W.2d 370 (1979); *Wells v. Griffin*, 266 Ark. 763, 586 S.W.2d 239 (1979); *Bass v. Home Fed. Sav. & Loan Ass'n*, 266 Ark. 770, 587 S.W.2d 48 (1979); *United States Borax & Chem. Co. v. Blackhawk Warehousing & Leasing Co.*, 266 Ark. 831, 586 S.W.2d 248 (1979); *Granite State Ins. Co. v. Bacon*, 266 Ark. 842, 586 S.W.2d 254 (1979); *Jones v. State*, 266 Ark. 855, 586 S.W.2d 258 (1979); *Smith v. State*, 266 Ark. 861, 587 S.W.2d 50 (Ct. App. 1979), cert. denied 445 U.S. 905, 100 S. Ct. 1082, 63 L. Ed. 2d 321 (1980); *Lybrand v. Arkansas Oak Flooring Co.*, 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979); *Richardson v. Rogers*, 266 Ark. 980, 588 S.W.2d 465 (Ct. App. 1979); *Desoto, Inc. v. Parsons*, 267 Ark. 665, 590

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Ins. Co., 330 Ark. 802, 957 S.W.2d 700 (1997); Seek v. State, 330 Ark. 833, 957 S.W.2d 709 (1997); MacKintrush v. State, 60 Ark. App. 42, 959 S.W.2d 404 (1997), aff'd 334 Ark. 390, 978 S.W.2d 293 (1998); Edgin v. Entergy Operations, Inc., 331 Ark. 162, 961 S.W.2d 724 (1998); Wright v. State, 331 Ark. 173, 959 S.W.2d 50 (1998); Evans v. State, 331 Ark. 240, 959 S.W.2d 745 (1998); McQuillan v. Mercedes-Benz Credit Corp., 331 Ark. 242, 961 S.W.2d 729 (1998); Hill v. State, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998); Webber v. Webber, 331 Ark. 395, 962 S.W.2d 345 (1998); McQuay v. Guntharp, 331 Ark. 466, 963 S.W.2d 583 (1998); Shepherd v. Washington County, 331 Ark. 480, 962 S.W.2d 779 (1998); Nelson v. Timberline Int'l, Inc., 332 Ark. 165, 964 S.W.2d 357 (1998); Ragar v. Brown, 332 Ark. 214, 964 S.W.2d 372 (1998); Small v. Cottrell, 332 Ark. 225, 964 S.W.2d 383 (1998); Heigle v. Miller, 332 Ark. 315, 965 S.W.2d 116 (1998); Higginbotham v. Junction City Sch. Dist., 332 Ark. 556, 966 S.W.2d 877 (1998), overruled in part Williams v. Little Rock Sch. Dist., 66 S.W.3d 590 (2002); Jones v. State, 332 Ark. 617, 967 S.W.2d 559 (1998); Marts v. State, 332 Ark. 628, 968 S.W.2d 41 (1998); Parker v. State, 333 Ark. 137, 968 S.W.2d 592 (1998); Southern Transit Co. v. Collums, 333 Ark. 170, 966 S.W.2d 906 (1998); Ozarks Unlimited Resources Coop. v. Daniels, 333 Ark. 214, 969 S.W.2d 169 (1998); Morgan v. State, 333 Ark. 294, 971 S.W.2d 219 (1998); Campbell v. City of Cherokee Village W., 333 Ark. 310, 969 S.W.2d 179 (1998); Van Camp v. Van Camp, 333 Ark. 320, 969 S.W.2d 184 (1998); Dillard v. State, 333 Ark. 418, 971 S.W.2d 764 (1998); Tabor v. State, 333 Ark. 429, 971 S.W.2d 227 (1998); UMLIC 2 Funding Corp. v. Butcher, 333 Ark. 442, 970 S.W.2d 211 (1998); Coats v. Gardner, 333 Ark. 581, 970 S.W.2d 802 (1998); L.H. v. State, 333 Ark. 613, 973 S.W.2d 477 (1998); Arkansas Bd. of Exm'rs. v. Carlson, 334 Ark. 614, 976 S.W.2d 934 (1998); VanWagoner v. Beverly Enters., 334 Ark. 12, 970 S.W.2d 810 (1998); Bailey v. State, 334 Ark. 43, 972 S.W.2d 239 (1998); Henderson Specialties, Inc. v. Boone County, 334 Ark. 111, 971 S.W.2d 234 (1998); Ford Motor Credit Co. v. Ellison, 334 Ark. 357, 974 S.W.2d 464 (1998); Jackson v. State, 334 Ark. 406, 976 S.W.2d 370 (1998); State v. Donahue, 334 Ark. 429, 978 S.W.2d 748 (1998); Federal Fin. Co. v. Noe, 335 Ark. 78, 983 S.W.2d 107 (1998); K.M. v. State, 335 Ark. 85, 983 S.W.2d 93 (1998); Southeast Foods, Inc. v. Keener, 335 Ark. 209, 979 S.W.2d 885 (1998); Glover v. Overstreet, 336 Ark. 1, 984 S.W.2d 406 (1999); Kinkead v. Spillers, 336 Ark. 60, 983 S.W.2d 425 (1999); Rhodes v. State, 332 Ark. 516, 967 S.W.2d 550 (1998); Moon v. Marquez, 338 Ark. 636, 999 S.W.2d 678 (1999); Biedenharn v. Hogue, 338 Ark. 660, 1 S.W.3d 424 (1999);

Blackwell v. State, 338 Ark. 671, 1 S.W.3d 399 (1999); Wooten v. State, 338 Ark. 691, 1 S.W.3d 8 (1999); Dansby v. State, 338 Ark. 697, 1 S.W.3d 403 (1999); Criddle v. State, 338 Ark. 744, 1 S.W.3d 436 (1999); Grine v. Board of Trustees, 338 Ark. 791, 2 S.W.3d 54 (1999); Fullerton v. McCord, 339 Ark. 45, 2 S.W.3d 775 (1999); Zawodniak v. State, 339 Ark. 66, 3 S.W.3d 292 (1999); Weaver v. State, 339 Ark. 97, 3 S.W.3d 323 (1999); Dean v. State, 339 Ark. 105, 3 S.W.3d 228 (1999); Kellar v. Fayetteville Police Dep't, 339 Ark. 274, 5 S.W.3d 402 (1999); McCullough v. State, 339 Ark. 288, 5 S.W.3d 38 (1999); Rainey v. Hartness, 339 Ark. 293, 5 S.W.3d 410 (1999); Luttrell v. City of Conway, 339 Ark. 408, 5 S.W.3d 464 (1999); Dean v. Williams, 339 Ark. 439, 6 S.W.3d 89 (1999); Brown v. Arkansas Dep't of Cor., 339 Ark. 458, 6 S.W.3d 102 (1999); Holbert v. Arkansas County, 339 Ark. 462, 5 S.W.3d 474 (1999); White v. Georgia-Pacific Corp., 339 Ark. 474, 6 S.W.3d 98 (1999); Harmon v. State, 340 Ark. 18, 8 S.W.3d 472 (2000); Leaks v. State, 339 Ark. 348, 5 S.W.3d 448 (1999); Ark. State Plant Bd. v. Bullock, 345 Ark. 373, 48 S.W.3d 516 (2001); Laird v. Shelnut, 348 Ark. 632, 74 S.W.3d 206 (2002); Finney v. Cook, 351 Ark. 367, 94 S.W.3d 333 (2002); Ark. County v. Desha County, 351 Ark. 387, 94 S.W.3d 888 (2003); Ford Motor Co. v. Harper, 351 Ark. 559, 95 S.W.3d 810 (2003); Vanderpool v. Pace, 351 Ark. 630, 97 S.W.3d 404 (2003); Weatherford v. State, 352 Ark. 324, 101 S.W.3d 227 (2003); Lenders Title Co. v. Chandler, 353 Ark. 339, 107 S.W.3d 157 (2003); Smith v. State, 354 Ark. 226, 118 S.W.3d 542 (2003); Craig v. Carrigo, 353 Ark. 761, 121 S.W.3d 154 (2003); Banks v. State, 354 Ark. 404, 125 S.W.3d 147 (2003); Harold Ives Trucking Co. v. Pickens, 355 Ark. 407, 139 S.W.3d 471 (2003); Lacy v. State, 355 Ark. 625, 144 S.W.3d 267 (2004); Elmore v. State, 355 Ark. 620, 144 S.W.3d 278 (2004); Wilmans v. Sears, Roebuck & Co., 355 Ark. 668, 144 S.W.3d 245 (2004); Allen v. Allison, 356 Ark. 403, 155 S.W.3d 682 (2004); Coggin v. State, 356 Ark. 424, 156 S.W.3d 712 (2004); Durham v. Marberry, 356 Ark. 481, 156 S.W.3d 242 (2004); Johnson v. State, 356 Ark. 534, 157 S.W.3d 151 (2004), cert. denied 543 U.S. 932, 125 S. Ct. 326, 160 L. Ed. 2d 235 (2004); Jones v. Double 'D' Props., 357 Ark. 148, 161 S.W.3d 839 (2004); Med. Park Hosp. v. BancorpSouth, 357 Ark. 316, 166 S.W.3d 19 (2004); Watson v. State, 358 Ark. 212, 188 S.W.3d 921 (2004); Valenzuela v. State, 358 Ark. 348, 189 S.W.3d 440 (2004); Ginsburg v. Ginsburg, 359 Ark. 226, 195 S.W.3d 898 (2004); Henyan v. Peek, 359 Ark. 486, 199 S.W.3d 51 (2004); Dorn v. State, 360 Ark. 1, 199 S.W.3d 647 (2004); Branscum v. Freeman, 360 Ark. 171, 200 S.W.3d 411 (2004); Cloird v. State, 357 Ark. 446, 182 S.W.3d 477 (2004); Springdale Sch. Dist. No. 50 v. Evans Law Firm, P.A., 360 Ark.

279, 200 S.W.3d 917 (2005); *McGhee v. Ark. State Bd. of Collection Agencies*, 360 Ark. 363, 201 S.W.3d 375 (2005); *First Nat'l Bank of Dewitt v. Cruthis*, 360 Ark. 528, 203 S.W.3d 88 (2005); *Koch v. Northport Health Servs. of Ark., LLC*, 361 Ark. 192, 205 S.W.3d 754 (2005); *Flowers v. State*, 362 Ark. 193, 208 S.W.3d 113 (2005); *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005); *Winkler v. Bethell*, 362 Ark. 614, 210 S.W.3d 117 (2005); *Campbell v. Entergy Ark., Inc.*, 363 Ark. 132, 211 S.W.3d 500 (2005); *Jones v. Billingsley*, 363 Ark. 96, 211 S.W.3d 508 (2005); *Barnett v. Howard*, 363 Ark. 150, 211 S.W.3d 490 (2005); *Whorton v. Dixon*, 363 Ark. 330, 214 S.W.3d 225 (2005); *Williams v. State*, 363 Ark. 395, 214 S.W.3d 829 (2005); *Hill v. State*, 363 Ark. 505, 215 S.W.3d 586 (2005); *Gilbert v. Moore*, 364 Ark. 127, 216 S.W.3d 583 (2005); *Regions Bank v. Griffin*, 364 Ark. 193, 217 S.W.3d 829 (2005); *Bashaw v. 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State*, 366 Ark. 265, 234 S.W.3d 848 (2006); *Whitt v. State*, 365 Ark. 580, 232 S.W.3d 459 (2006); *First Nat'l Bank v. Mayberry*, 366 Ark. 39, 233 S.W.3d 152 (2006); *Mack v. Sutter*, 366 Ark. 1, 233 S.W.3d 140 (2006); *Davis v. Bland*, 367 Ark. 210, 238 S.W.3d 924 (2006); *Deaver v. Faucon Props.*, 367 Ark. 288, 239 S.W.3d 525 (2006); *Shelton v. Keathley (In re Estate of Keathley)*, 367 Ark. 568, 242 S.W.3d 223 (2006); *Parker v. Johnson*, 368 Ark. 190, 244 S.W.3d 1 (2006); *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006); *Sowers v. St. Joseph's Mercy Health Ctr.*, 368 Ark. 466, 247 S.W.3d 514 (2007); *C.A.R. Transp. Brokerage Co. v. Seay*, 369 Ark. 354, 255 S.W.3d 445 (2007); *Artman v. Hoy*, 370 Ark. 131, 257 S.W.3d 864 (2007); *Price v. Thomas Built Buses, Inc.*, 370 Ark. 405, 260 S.W.3d 300 (2007); *Zollicoffer v. Post*, 371 Ark. 263, 265 S.W.3d 114 (2007); *Honeycutt v. Foster*, 371 Ark. 545, 268 S.W.3d 875 (2007); *Jefferson v. 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City of Cotter*, 2009 Ark. 457, 344 S.W.3d 654 (2009); *Pounders v. Reif*, 2009 Ark. 581, — S.W.3d —, 2009 Ark. LEXIS 756 (2009); *Lawshea v. State*, 2009 Ark. 600, 357 S.W.3d 901 (2009); *Williams v. State*, 2010 Ark. 89, — S.W.3d —, 2010 Ark. LEXIS 117 (Feb. 25, 2010); *Hickey v. State*, 2010 Ark. 109, — S.W.3d —, 2010 Ark. LEXIS 130 (Mar. 4, 2010); *Fernandez v. State*, 2010 Ark. 148, 362 S.W.3d 905 (2010); *Lafont v. Mixon*, 2010 Ark. 450, — S.W.3d —, 2010 Ark. LEXIS 551 (Nov. 18, 2010); *Neely v. State*, 2010 Ark. 452, — S.W.3d —, 2010 Ark. LEXIS 558 (Nov. 18, 2010); *Hudak-Lee v. Baxter County Reg'l Hosp. & Risk Mgmt. Res.*, 2011 Ark. 31, — S.W.3d —, 2011 Ark. LEXIS 31 (Feb. 3, 2011); *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011); *Green v. State*, 2011 Ark. 92, — S.W.3d —, 2011 Ark. LEXIS 82 (Mar. 3, 2011); *Curry v. Pope County Equalization Bd.*, 2011 Ark. 408, — S.W.3d —, 2011 Ark. LEXIS 507 (Oct. 6, 2011); *Ritter v. State*, 2011 Ark. 427, — S.W.3d —, 2011 Ark. LEXIS 526 (Oct. 13, 2011); *Vankirk v. State*, 2011 Ark. 428, — S.W.3d —, 2011 Ark. LEXIS 527 (Oct. 13, 2011); *Searcy County Counsel for Ethical Gov't v. Hinchey*, 2011 Ark. 533, — S.W.3d —, 2011 Ark. LEXIS 618 (Dec. 15, 2011); *Webb v. State*, 2012 Ark. 64, — S.W.3d —, 2012 Ark. LEXIS 81 (Feb. 16, 2012); *White v. State*, 2012 Ark. 221, — S.W.3d —, 2012 Ark. LEXIS 253 (May 24, 2012); *Charland v. State*, 2012 Ark. 246, — S.W.3d —, 2012 Ark. LEXIS 259 (May 31, 2012).

Rule 1-3. Uniform paper size.

All briefs, motions, pleadings, records, transcripts, and other papers required or authorized by these Rules shall be on 8½" x 11" paper.

Publisher's Notes. The June 25, 1990 Per Curiam read: "By per curiam, dated February 5, 1990, this court issued its order concerning guidelines for child support enforcement.

"In publishing our per curiam, we noted that this was a provisional order of the court, and doing so, directed the chief justice and the committee on child support to continue its charge to study, and revise when necessary, the guidelines for child support to insure the proper enforcement of child support awards in the state.

"Inasmuch as this court, on May 15, 1989, adopted Supreme Court Rule 30, which mandated a uniform paper size of 8½ x 11, the chief justice and the committee have caused the forms which are in present use, to be revised accordingly.

"We now approve the revised forms entitled Income Withholding Hearing Notice, Claim Form, and Notice of Income Withholding for Support as reduced from legal size to our mandated size of 8½ x 11."

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

Rule 1-4. Clerk's office business hours.

The Clerk will record the exact time and date of filing or tender upon any document filed or tendered for filing in the Clerk's Office. Filings shall occur only between business hours of 8:00 a.m. and 5:00 p.m. on business days.

If the Clerk discovers documents left in or about the Clerk's Office after business hours with a written request for filing or tender, and the documents are in order for filing or tender, they may be marked as filed or tendered as of the beginning of the following business day. Neither the Clerk nor any member of the Clerk's Office staff shall be responsible to see to it that documents are filed or tendered unless they are presented during business hours by a person delivering them to the Clerk's Office.

Rule 1-5. Contempt.

No argument, brief, or motion filed or made in the Court shall contain language showing disrespect for the circuit court. (Amended June 7, 2001, effective July 1, 2001.)

CASE NOTES**ANALYSIS**

Scope of rule.

Showing of disrespect.

Scope of Rule.

The appellant court may not impose any sanctions for alleged libelous statements in brief regarding "fruits of the crime," as the only authority for sanctioning comments in a brief is when the comments are disrespectful to the trial court. *Perryman v. Hackler*, 323 Ark. 500, 916 S.W.2d 105 (1996).

Showing of Disrespect.

Where appellant's brief attributed seriously wrongful conduct to appellee's counsel and

bias to the trial judge, in accusations which appeared as assertions of fact, but which were wholly unsupported by the proof in the record and which were made in intemperate and disrespectful language so as to violate this rule, the entire brief was struck from the files of the Supreme Court and the judgment affirmed. *McLemore v. Elliot*, 272 Ark. 306, 614 S.W.2d 226 (1981) (decision under prior rule).

The appellants did not violate this rule by showing disrespect to the trial court in their brief, where they stated that they observed no pain or agony in the trial court with respect to the fees being charged to the estate and that the trial court erroneously computed the suc-

cessor administrator's fee at \$121 per hour. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 304, 719 S.W.2d 273 (1986) (decision under prior rule).

Where language in appellant's brief was offensive and disrespectful to the trial court, the pages in the brief containing that language were stricken from the appellate court's records, as a sanction for violating the rule. *Henry v. Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992) (decision under prior rule).

Where defendant stated in his appellate brief that he was not protected from "the capricious whims of a judge who did not understand the law under which he was sentencing him," the appellate court found the sentence disrespectful and distasteful and struck it from the brief. *Cox v. State*, 365 Ark. 358, 229 S.W.3d 883 (2006).

Arkansas Supreme Court had the power to

recommend the attorney to the Arkansas Supreme Court Committee (Committee) on Professional Conduct based upon his disrespectful language toward the supreme court, and it was within the Committee's power to determine whether or not the attorney's conduct violated any of the Model Rules of Professional Conduct; this rule gave the attorney more than enough notice that his conduct was not allowed, and the Committee did not err in its decision to punish the attorney. *Stilley v. Supreme Court Comm. on Prof'l Conduct*, 370 Ark. 294, 259 S.W.3d 395 (2007), cert. denied 552 U.S. 1184, 128 S. Ct. 1248, 170 L. Ed. 2d 67 (2008).

Cited: *Davenport v. Pack*, 35 Ark. App. 40, 812 S.W.2d 487 (1991); *Manatt v. State*, 311 Ark. 17, 842 S.W.2d 845 (1992), cert. denied 507 U.S. 1005, 113 S. Ct. 1647, 123 L. Ed. 2d 268 (1993).

Rule 1-6. Employees of the court.

No employee of either Court shall engage in the practice of law or have a pecuniary interest in any concern that does business with either Court.

Rule 1-7. Practice absent specific rule.

In cases where no provision is made by statute or other rule, proceedings in the Court shall be in accordance with existing practice.

CASE NOTES

Cited: *Carroll v. Carroll*, 33 Ark. App. 133, 802 S.W.2d 932 (1991) (decision under prior rule).

ARTICLE II. PETITIONS AND MOTIONS

Rule 2-1. Motions.

(a) *Writing required.* All motions, petitions, and responses filed in the appellate court must be in writing and comply with the requirements of Rule 4-1(a) in regard to the style of briefs.

(b) *Number of copies.* In cases pending before the Supreme Court, eight (8) clearly legible copies must be filed on 8½" x 11" paper. In cases pending before the Court of Appeals, fourteen (14) clearly legible copies must be filed on 8½" x 11" paper.

(c) *Service.* Evidence of service of a motion, petition, or response upon opposing counsel must be furnished at the time of filing.

(d) *Response.* A response may be filed within 10 calendar days of the filing of a motion or petition. Evidence of service is required.

(e) *Memorandum of authorities.* With any motion, petition, application for temporary relief, or other action of the court that is sought before the regular submission of the case, the moving party shall file and serve upon opposing counsel or an unrepresented party a short citation of statutes, rules of court, and other authorities upon which the movant or petitioner

relies. Any party responding to any such motion, petition, or application shall likewise file a memorandum of authorities.

(f) *Compliance with Administrative Order 19 required.* Every motion, petition, response, similar paper, memorandum of authorities, and any document attached to any of those papers, must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal.

(g) *Motions for reconsideration.* Any motion to reconsider the appellate court's order deciding any motion or petition must be filed no later than eighteen calendar days after the date of the order.

(h) *Page length.* Except as otherwise provided in these rules, a motion, petition, or response, including the memorandum of authorities and supporting brief, if any, but excluding any exhibits, shall not exceed ten 8½" x 11" double-spaced, typewritten pages and shall comply with the provisions of Rule 4-1(a), except that if the motion, petition, or response and supporting documents are not more than three pages, they need not be bound as set forth in Rule 4-1(a). Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this rule has been made. The motion must specify the number of additional pages requested. (Amended December 11, 1995, effective January 1, 1996; amended December 9, 1996, effective January 1, 1997; amended October 23, 2008, effective January 1, 2009; amended June 3, 2010, effective July 1, 2010; amended May 24, 2012, effective July 1, 2012.)

Addition to Reporter's Notes, 2012 Amendment: Prior to the 2012 amendment, this rule applied only to "motions." Because filings in the appellate court may also take the form of "petitions" and "responses," the amendment expands the rule to cover petitions and responses.

The 2012 amendments also add subsection

(h). The introductory clause to subsection (h) makes it clear that the 10-page limit of this rule is preempted by a Supreme Court rule setting a different page limit with respect to a particular motion, petition, or response. For example, Supreme Court Rule 2-4 limits petitions for review to three pages, and subsection (h) does not change that limit.

CASE NOTES

Cited: Todd v. Peloso, 12 Ark. App. 404, 680 S.W.2d 712 (1984) (decision under prior rule).

Rule 2-2. Motion for rule on clerk.

(a) *Record tendered late.* Where a record is tendered which, on its face, appears to be outside the time allotted for docketing the case, it shall be the duty of the Clerk to notify the attorney representing the appellant and note on the record the date the tender was made.

(b) *Docketing for purpose of presenting request for rule — Service of motion.* If the appellant contends that the Clerk is in error in refusing to file the record, then upon payment of the regular filing fee, the case shall be tentatively docketed and numbered. The appellant shall then file a motion in accordance with Rule 2-1 to require the Clerk to docket the case as an

appeal. A copy of the motion shall be served by the appellant upon opposing counsel, and evidence of service shall be furnished to the Clerk with the motion at the time of filing.

(c) *Procedure when rule granted.* If the motion is granted, the case shall proceed in the regular manner for appeals without payment of any additional fee.

(d) *Procedure when rule denied.* If the motion is denied, the case shall be stricken from the docket, the jurisdiction of the Court terminated, and the filing fee forfeited.

CASE NOTES

ANALYSIS

Counsel's responsibility.

—Improper motion.

Failure to perfect appeal.

Grant or denial.

Untimely notice of appeal.

Counsel's Responsibility.

Where counsel assumes responsibility, the motion for a rule on the clerk is granted routinely; where counsel fails to accept responsibility, but it is plain from the record where the fault lies, rule on the clerk will be granted upon a finding that counsel's neglect was the occasion for the failure to tender the record in a timely manner. *Shuffield v. State*, 292 Ark. 185, 729 S.W.2d 11 (1987) (decision under prior rule).

Motion for rule on the clerk was denied where the attorney fell short in admitting error or neglect in failing to timely file record. *Huggins v. State*, 304 Ark. 505, 803 S.W.2d 544 (1991) (decision under prior rule).

Supreme Court of Arkansas refused to reconsider its holding in *Tarry v. State*, 57, S.W.3d 163 (2001), that defendant would be allowed to proceed with a late appeal of his conviction only if defendant's counsel admitted fault in failing to file the record in a timely fashion; regulation of the practice of law in state courts was a matter within the authority of the Supreme Court of Arkansas and the Court was not required to suspend its rules and procedures because a federal tribunal challenged the Court's authority sua sponte. *Tarry v. State*, 353 Ark. 158, 114 S.W.3d 161 (2003).

Where counsel was ordered to accept responsibility for the untimely filing of the record within 30 days and to file an appropriate motion with the participation of a licensed attorney from Arkansas, and counsel again filed motions to withdraw and for motion for rule on the clerk, he was ordered to appear and show cause as to why he should not be held in contempt of court. *McKenzie v. State*, 355 Ark. 259, 134 S.W.3d 5 (2003).

Where the clerk of the Supreme Court did not err in refusing to docket defendant's untimely appeal, defendant's attorney, who was ultimately responsible for filing the appeal,

was left with the only option of admitting fault so that defendant's motion for rule on the clerk could be granted. *Waddle v. State*, 356 Ark. 501, 156 S.W.3d 226 (2004).

Motion for rule on clerk was granted because appellant's attorney admitted in the motion his responsibility for failing to timely file the record and, while the Supreme Court of Arkansas no longer required an affidavit admitting fault before it would consider a motion, an attorney should candidly admit fault where he erred and was responsible for the failure to perfect an appeal. *Wilkerson v. State*, 370 Ark. 480, 261 S.W.3d 450 (2007).

—Improper Motion.

Attorney incorrectly filed a motion for rule on the clerk when his criminal appeal was rejected as untimely and the record clearly showed that the attorney was at fault for failing to appeal from a motion to suppress evidence within 30 days of a judgment denying the motion; however, the court treated the improper motion as one for a belated appeal, which was granted even though the attorney failed to admit fault. *McDonald v. State*, 356 Ark. 106, 146 S.W.3d 883 (2004).

Failure to Perfect Appeal.

If the issue of failure to perfect an appeal involves docketing the record, then relief must be sought under this rule. *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004).

Grant or Denial.

Error made by attorney for criminal defendant provided grounds for granting motion. *Price v. State*, 292 Ark. 557, 732 S.W.2d 126 (1987) (decision under prior rule).

Motion to file transcript allowed where rule governing proper procedure had only recently been adopted. *Evans v. Northwest Tire Serv.*, 21 Ark. App. 75, 728 S.W.2d 523 (1987) (decision under prior rule).

Where attorney admitted that the record was tendered late due to a mistake on his part there was good cause to grant the motion for rule on the clerk. *Johnson v. State*, 306 Ark. 423, 814 S.W.2d 559 (1991) (decision under prior rule).

A criminal defendant's attorney's admission that the record was tendered late due to a

mistake on his part constitutes good cause to grant a motion for rule on the clerk. *McGrew v. State*, 333 Ark. 207, 966 S.W.2d 266 (1998).

Where trial counsel failed to timely file the record on appeal, defendant's motion for rule on the clerk was granted; the clerk was directed to accept the appeal and the matter of attorney error was remanded to the circuit court for findings of fact. *McGahey v. State*, 359 Ark. 252, 195 S.W.3d 922 (2004).

Motion for rule on clerk was denied because a supreme court clerk was correct in refusing to docket an appeal because, while a timely notice of appeal was filed, (1) a motion for extension was not filed with a circuit clerk before the expiration of the ninety-day deadline for filing the record, under Ark. R. App. P. Civ. 5(a); (2) because the motion for extension was untimely, a proper order extending the time could not have been properly filed, under Ark. R. App. P. Civ. 5(b); and (3) it was the duty of appellants' attorney to monitor the filing prior to the deadline, and the attorney failed to do so. *McCoy v. Carter Jones Timber Co.*, 370 Ark. 470, 261 S.W.3d 467 (2007).

Appellants' motion for rule on clerk, which sought an order directing the Arkansas Supreme Court Clerk to accept their record for filing, was denied because the order of extension of time entered by a circuit court was void because the requirements of Ark. R. App. P. Civ. 5 were not met because the request for extension was not properly brought by appellants. *Spurlock v. Riddell*, 373 Ark. 38, 280 S.W.3d 18 (2008).

Untimely Notice of Appeal.

Motion for rule on the clerk was properly denied where the notice of appeal was un-

timely, even though the motion was accompanied by a certificate of the attorney for the appellee stating that he had no objection to the granting of the motion; although a party may consent to jurisdiction over his person, jurisdiction cannot otherwise be conferred on the court by consent. *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980) (decision under prior rule).

Where defendant filed his notice of appeal before the expiration of the 30-day period the notice had no effect and clerk correctly refused to file the record. *Bush v. Bush*, 306 Ark. 513, 816 S.W.2d 590 (1991) (decision under prior rule).

Where defendant's motion for rule on clerk and accompanying record failed to reveal whether there was any error by defendant's attorney, the clerk was directed to accept the appeal, and the matter of attorney error was remanded to the circuit court to make findings of fact; in addition, defendant's counsel had fifteen days from the date of the order to have the circuit court clerk date stamp the notice of appeal. *Barnett v. State*, 358 Ark. 358, 190 S.W.3d 909 (2004).

Where the motion for rule on clerk and accompanying record failed to reveal plainly whether there was attorney error by either of defendant's attorneys, the appellate court directed the clerk to accept the appeal, and it remanded the matter of attorney error to the circuit court to make findings of fact. *Bryant v. State*, 358 Ark. 362, 190 S.W.3d 908 (2004).

Cited: *Christopher v. Jones*, 271 Ark. 911, 611 S.W.2d 521 (1981); *Blevins v. UIS*, 29 Ark. App. 102, 780 S.W.2d 584 (1989) (preceding decisions under prior rule); *Porter v. State*, 315 Ark. 160, 865 S.W.2d 300 (1993).

Rule 2-3. Petitions for rehearing.

(a) *Filing and service.* A petition for rehearing, a brief in support of the petition, and evidence of service of the petition, brief, and a certificate of merit stating that the petition is not filed for the purpose of delay, shall be filed within 18 calendar days from the date of decision.

(b) *Response.* The respondent may file a brief on the following Monday (in the Supreme Court) or Wednesday (in the Court of Appeals) or within seven calendar days from the filing of the petition for rehearing, whichever last occurs, or may, on or before that time, obtain an extension of one week upon written motion to the Court.

(c) *Additional time.* Neither party will be granted further time than as indicated above, except upon written motion to the Court and a showing of illness of counsel or other unavoidable casualty.

(d) *Number of copies to be filed.* Eight copies of the petition must be filed for Supreme Court cases and fourteen copies of the petition must be filed for Court of Appeals cases, and a copy must be served upon opposing counsel.

(e) *Page length.* In all cases, both civil and criminal, the petition and supporting brief, if any, including the style of the case and the certificate of counsel, shall not exceed ten 8½" x 11" double-spaced, typewritten pages and

shall comply with the provisions of Rule 4-1(a), except that if the petition and supporting argument are not more than three pages, they need not be bound as set forth in Rule 4-1(a).

(f) *Ground(s) stated.* The petition must specifically state the ground(s) relied upon.

(g) *Entire case not to be reargued.* The petition for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain. Counsel are expected to argue the case fully in the original briefs, and the brief on rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the Court.

(h) *Previous reference in abstract or Addendum.* In no case will a rehearing petition be granted when it is based upon any fact thought to have been overlooked by the Court, unless reference has been clearly made to it in the abstract of the transcript or the Addendum of the record prescribed by Rules 4-2 and 4-3.

(i) *No oral argument.* Oral argument will not be permitted on a petition for rehearing.

(j) *Limited to one petition.* A party may submit only one petition for rehearing.

(k) *New counsel.* Litigants will not be permitted to substitute new counsel for the purpose of filing a petition for rehearing. Additional counsel may, however, participate in a petition for rehearing, or in opposition to the petition, by joining with the original counsel in the petition and brief, or by obtaining permission of the Court by motion.

(l) *Compliance with Administrative Order 19 required.* Every petition for rehearing, brief in support, and brief in response must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal. (Amended November 8, 1993, effective January 1, 1994; amended June 30, 1997, effective September 1, 1997; amended May 31, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended September 20, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended January 22, 2004; amended October 23, 2008, effective January 1, 2009.)

Publisher's Notes. The Per Curiam order of March 22, 1993, provided in part: "By this order we interpret Rule 20(k) [now this rule] to mean that amici curiae counsel must file briefs in support of or in opposition to rehearing simultaneously with their motions for permission to participate. If the motion and amicus brief support rehearing or are neutral, they must be filed within the time period that

the petitioner's petition and brief are due. If the motion and amicus brief oppose rehearing, they must be filed within the time period that the respondent's petition and brief are due.

"Henceforth, no additional time to file and amicus brief will be granted. Amicus briefs must accompany motions to participate."

RESEARCH REFERENCES

Ark. L. Rev. Arkansas Appellate Practice: Abstracting The Record, 31 Ark. L. Rev. 359.

CASE NOTES

ANALYSIS

Amicus curiae counsel.

Attorney's fees.

Entire case not to be reargued.

Grounds stated.

Repetition of arguments.

Time limit.

Amicus Curiae Counsel.

Amici curiae counsel must file briefs in support of or in opposition to rehearing simultaneously with their motions for permission to participate; if the motion and amicus brief support rehearing or are neutral, they must be filed within the time period that the petitioner's petition and brief are due; if the motion and amicus brief oppose rehearing, they must be filed within the time period that the respondent's petition and brief are due. *Yates v. Sturgis*, 312 Ark. 397, 849 S.W.2d 523 (1993) (decision under prior rule).

No additional time to file an amicus brief will be granted. Amicus briefs must accompany motions to participate. *Yates v. Sturgis*, 312 Ark. 397, 849 S.W.2d 523 (1993) (decision under prior rule).

Attorney's Fees.

Petition for attorney's fees is not a petition for rehearing when the issue was not considered or decided by the trial court; the appellate court retains jurisdiction to consider a motion for attorney's fees. *Jones v. Jones*, 327 Ark. 195, 938 S.W.2d 228 (1997).

Entire Case Not to be Reargued.

A rehearing does not encompass a set of new facts, new briefs, and new arguments. *Pannell v. State*, 320 Ark. 390, 897 S.W.2d 552 (1995).

Grounds Stated.

Since alleged error was never cited in a petition for rehearing under this rule, and the Supreme Court was never afforded an opportunity to correct the supposed error, the disposition of the case was final under S. Ct. & Ct. App. Rule 5-3. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Repetition of Arguments.

A petition for rehearing which simply reargues interpretation of statute will not be

considered under subsection (g) of the former rule. *Warren v. Warren*, 273 Ark. 528, 623 S.W.2d 813 (1981) (decision under prior rule).

Repetition of original argument on appeal was inappropriate subject for a petition for rehearing. *Butler Mfg. Co. v. Hughes*, 292 Ark. 198, 731 S.W.2d 214 (1987); *Midgett v. State*, 292 Ark. 278, 729 S.W.2d 410 (1987).

Petitions for rehearing are not intended to present arguments which are merely repetitions of those already considered by the court, and such petitions that do so are ordinarily denied without written comment. *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1, cert. denied 488 U.S. 863, 109 S. Ct. 163, 102 L. Ed. 2d 133 (1988).

Time Limit.

Former Supreme Court and Court of Appeals Rules 20(a) (now Rule 2-3) and 29(6) (now Rule 2-4) needed to be revised to remove the strict 17 calendar day requirement for filing petitions for review and rehearing so that ARAP 9 would apply to the time limits on those petitions. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 311A, 722 S.W.2d 598 (1987) (decision under prior rule).

Cited: *Herrick v. Robinson*, 267 Ark. 576, 595 S.W.2d 637 (1980); *LaRue v. LaRue*, 268 Ark. 86, 593 S.W.2d 185 (1980); *Huth v. Division of Social Servs. of Dep't of Human Servs.*, 287 Ark. 294, 700 S.W.2d 367 (1985); *Southern Paper Box Co. v. Houston*, 15 Ark. App. 176, 697 S.W.2d 124 (1985); *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459 (1987); *Sebastian County v. Educare Ctrs., Inc.*, 296 Ark. 538, 758 S.W.2d 413 (1988); *Hamilton v. Jeffrey Stone Co.*, 25 Ark. App. 66, 752 S.W.2d 288 (1988), review denied 759 S.W.2d 792 (1988); *Womack v. Newman Fixture Co.*, 27 Ark. App. 117, 766 S.W.2d 949 (1989); *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 332, 788 S.W.2d 742 (1990); *National Bank of Commerce v. Beavers*, 304 Ark. 81, 802 S.W.2d 132 (1990); *Nard v. State*, 304 Ark. 159, 801 S.W.2d 634 (1991), modified 304 Ark. 163A, 801 S.W.2d 634 (1991); *Clements v. State*, 312 Ark. 528, 851 S.W.2d 422 (1993); *Morris v. State*, 365 Ark. 217, 226 S.W.3d 790 (2006).

Rule 2-4. Petitions for review.

(a) *Contents of petition.* A petition to the Supreme Court for review of a decision of the Court of Appeals must be in writing and must be filed within

18 calendar days from the date of the decision, regardless of whether a petition for rehearing is filed with the Court of Appeals. The petition may be typewritten and shall not exceed three 8½" x 11", double-spaced pages in length. The petition must briefly and distinctly state the basis upon which the case should be reviewed and may include citations of authority or references to statutes or constitutional provisions. The petition can only be filed by a party to the appeal and is otherwise subject to Rule 1-2(e).

(b) *Briefs and oral argument prohibited.* Briefs will not be accepted and oral arguments will not be heard in support of petitions for review. However, the petitioner may attach a copy of the petition for rehearing to the petition for review.

(c) *Grounds for review.* A petition for review must allege one of the following: (i) the case was decided in the Court of Appeals by a tie vote, (ii) the Court of Appeals rendered a decision which is in conflict with a prior holding of a published opinion of either the Supreme Court or the Court of Appeals, or (iii) the Court of Appeals otherwise erred with respect to one of the grounds listed in Rule 1-2(b).

(d) *Response.* A response to a petition for review must be filed within 10 calendar days of the date the petition was filed. Responses are subject to the same limitations as petitions. The respondent may attach a copy of the response to the petition for rehearing to the response to the petition for review.

(e) *Clerk's notification; request for oral argument.* When the Supreme Court grants a petition for review, the Clerk shall promptly notify all counsel and parties appearing pro se. Within two weeks of the notification, eighteen additional copies of the briefs previously submitted to the Court of Appeals shall be filed with the Clerk. Any party may request oral argument by filing, contemporaneously with that party's filing of the additional copies of the briefs, a letter, separate from the brief, stating the request with a copy to all parties. The decision to grant the request for oral argument and other aspects of oral argument are governed by Rule 5-1.

(f) *Supplemental and reply briefs.* Any party may request permission to submit a supplemental brief by motion, filed with the Clerk and served upon all other parties, within two weeks after the granting of review. The moving party's brief shall be due 20 calendar days from the granting of the motion. Other parties may file responsive supplemental briefs within 10 calendar days of the date the moving party's supplemental brief is filed. A reply brief may be filed within five calendar days after the filing of a responsive supplemental brief. No supplemental brief, responsive supplemental brief, or reply brief submitted pursuant to this Rule shall exceed 10 pages in length. These briefs shall otherwise conform to the requirements of Rule 4-1.

(g) *Compliance with Administrative Order 19 required.* Every petition for review, response, and supplemental brief of any kind on review must comply with the protective requirements for confidential information established by Administrative Order 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes: (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal. (Subsection (c) amended July 15, 1996, effective for cases in which the record is lodged on or after September 1, 1996; amended June 30, 1997, effective for cases in which the record is lodged on or after September 1,

1997; amended January 22, 2004; amended October 23, 2008, effective January 1, 2009; amended June 3, 2010, effective July 1, 2010.)

Publisher's Notes. By Per Curiam dated July 15, 1996, the Supreme Court provided, in part, that effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 1996, and as more fully explained in the amended rules which follow [Sup. Ct. & Ct. App. Rules 1-2, 2-4, 4-2], it will be necessary for the appellant, at the time the appellant's brief is filed, to complete and file a "Cover

Sheet and Jurisdictional Statement." The chief aim of these papers is to identify cases of legal significance and importance, irrespective of the category of the law, which should be decided in the Supreme Court. Each court shall review the information contained in the Cover Sheet and Jurisdictional Statement as a threshold matter to assess whether the appeal is filed in the proper court, and, if not, to promptly transfer or certify the case.

RESEARCH REFERENCES

Ark. L. Rev. Lawrence, A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court, 37 Ark. L. Rev. 418.

U. Ark. Little Rock L.J. Powell, Survey of Workers' Compensation Law, 3 U. Ark. Little Rock L.J. 329.

Survey of Arkansas Law: Civil Procedure, 4 U. Ark. Little Rock L.J. 171.

CASE NOTES

ANALYSIS

In general.

Federal habeas petitions.

Supplemental briefs.

Timely filing.

In General.

When a petition for review is granted pursuant to this rule, the appeal is treated as if it were filed in the Supreme Court originally. *Travis v. State*, 331 Ark. 7, 959 S.W.2d 32 (1998).

Federal Habeas Petitions.

Because the grounds for review listed in Ark. Sup. Ct. & Ct. App. R. 1-2(b) and subsection (c) of this rule were not exhaustive, and this rule did not impose an "affirmative duty" on prisoners to appeal to the Arkansas Supreme Court in any situation, the Arkansas Court of Appeals was not the "state court of last resort" in petitioner's case, and the U.S. Supreme Court could not have reviewed either the Arkansas Court of Appeals' affirmation of petitioner's conviction or denial of his motion for rehearing; accordingly, the expiration of time for seeking direct review did not include the time period that petitioner could have filed a petition for certiorari, and his 28 U.S.C.S. § 2254 petition for habeas corpus relief was correctly dismissed as untimely. *Parmley v. Norris*, 586 F.3d 1066 (8th Cir. 2009).

Supplemental Briefs.

Where the appellants submitted a supplemental brief that was 10 pages in length and

contained 28 single-spaced footnotes, one of which exceeded two full pages of text, the court struck the brief and ordered the appellants to resubmit a supplemental brief that conformed with the rule. *Bharodia v. Pledger*, 339 Ark. 89, 2 S.W.3d 783 (1999).

Arkansas Supreme Court was precluded from addressing defendant's expanded argument regarding the denial of defendant's motion to suppress because defendant raised points that were not originally submitted to the court of appeals for review. *Fuson v. State*, 2011 Ark. 374, — S.W.3d —, 2011 Ark. LEXIS 470 (Sept. 22, 2011).

Timely Filing.

Where the decision of the Court of Appeals was delivered on December 12, 1979, but where a petition for review was not filed in the Supreme Court until January 25, 1980, the petition for review was not timely. *Fuller v. Norwood*, 268 Ark. 89, 610 S.W.2d 265 (1981) (decision under prior rule).

Former S. Ct. & Ct. App. Rule 20(a) and subdivision 6 of the former rule needed to be revised to remove the strict 17 calendar day requirement for filing petitions for review and rehearing so that ARAP 9 will apply to the time limits on those petitions. *Sloss v. Farmers Bank & Trust Co.*, 290 Ark. 311A, 722 S.W.2d 598 (1987) (decision under prior rule).

Cited: *Williams v. Coca-Cola Bottling Co.*, 266 Ark. 736, 585 S.W.2d 372 (1979); *Jackson v. State*, 266 Ark. 754, 585 S.W.2d 367 (1979), cert. denied 444 U.S. 1017, 100 S. Ct. 670, 62 L. Ed. 2d 647 (1980); *Chandler Trailer Con-*

voy, Inc. v. Henson, 266 Ark. 760, 585 S.W.2d 370 (1979); Wells v. Griffin, 266 Ark. 763, 586 S.W.2d 239 (1979); Bass v. Home Fed. Sav. & Loan Ass'n, 266 Ark. 770, 587 S.W.2d 48 (1979); United States Borax & Chem. Co. v. Blackhawk Warehousing & Leasing Co., 266 Ark. 831, 586 S.W.2d 248 (1979); Granite State Ins. Co. v. Bacon, 266 Ark. 842, 586 S.W.2d 254 (1979); Jones v. State, 266 Ark. 855, 586 S.W.2d 258 (1979); Smith v. State, 266 Ark. 861, 587 S.W.2d 50 (Ct. App. 1979), cert. denied 445 U.S. 905, 100 S. Ct. 1082, 63 L. Ed. 2d 321 (1980); Lybrand v. Arkansas Oak Flooring Co., 266 Ark. 946, 588 S.W.2d 449 (Ct. App. 1979); Richardson v. Rogers, 266 Ark. 980, 588 S.W.2d 465 (Ct. App. 1979); Desoto, Inc. v. Parsons, 267 Ark. 665, 590 S.W.2d 51 (Ct. App. 1979); Boensch v. Cornett, 267 Ark. 671, 590 S.W.2d 55 (Ark. App. 1979); Spratt v. State, 267 Ark. 687, 590 S.W.2d 65 (Ct. App. 1979); Wharton v. Moss, 267 Ark. 723, 594 S.W.2d 856 (Ct. App. 1979); George v. George, 267 Ark. 823, 591 S.W.2d 655 (Ct. App. 1979); Miller v. Hardwick, 267 Ark. 841, 591 S.W.2d 659 (Ct. App. 1979); Carlton v. Baker, 267 Ark. 949, 591 S.W.2d 696 (Ct. App. 1979); Higgins v. Higgins, 266 Ark. 953, 588 S.W.2d 445 (1979); Kellum v. Gray, 266 Ark. 996, 590 S.W.2d 33 (1979); St. Paul Fire & Marine Ins. Co. v. Prothro, 266 Ark. 1020, 590 S.W.2d 35 (1979); J.L. Wilson Farms, Inc. v. Wallace, 267 Ark. 643, 590 S.W.2d 42 (1979); Arkansas Farm Prods., Inc. v. Ford Motor Credit Co., 267 Ark. 653, 590 S.W.2d 48 (1979); Urosevic v. Hayes, 267 Ark. 739, 590 S.W.2d 77 (1979); Ashmore v. Ford, 267 Ark. 854, 591 S.W.2d 666 (1979), limited *Druckenmiller v. Cluff*, 316 Ark. 517, 873 S.W.2d 526 (1994); Fuller v. Norwood, 267 Ark. 900, 592 S.W.2d 452 (1979), appeal denied 610 S.W.2d 265 (Ark. 1980); Williams v. Fletcher, 267 Ark. 961, 593 S.W.2d 48 (1979); St. Clair v. Haun, 601 S.W.2d 223 (1979); Blount v. McCurdy, 267 Ark. 989, 593 S.W.2d 468 (Ct. App. 1980); Kirkendoll v. Hogan, 267 Ark. 1083, 593 S.W.2d 498 (Ct. App. 1980); Bolden v. State, 267 Ark. 504, 593 S.W.2d 156 (1980); Lewallen v. Bethune, 267 Ark. 976, 593 S.W.2d 64 (1980), overruled *Elliot v. Boone County Indep. Living*, 56 Ark. App. 113, 939 S.W.2d 844 (1997); Edwards v. Hall, 267 Ark. 1003, 593 S.W.2d 465 (1980); Foshee v. Murphy, 267 Ark. 1047, 593 S.W.2d 486 (1980); Caldwell v. State, 267 Ark. 1053, 594 S.W.2d 24 (1980); Harris v. Damron, 267 Ark. 1141, 594 S.W.2d 256 (1980); State v. Bocksnick, 268 Ark. 74, 593 S.W.2d 176 (1980); Hawthorne v. Davis, 268 Ark. 131, 594 S.W.2d 844 (1980); Moore v. State, 268 Ark. 171, 594 S.W.2d 245 (1980); Bethell v. Bethell, 268 Ark. 409, 597 S.W.2d 576 (1980); Martin v. Moore, 269 Ark. 375, 601 S.W.2d 838 (1980); State v. Block, 270 Ark. 671, 606 S.W.2d 362 (1980), cert. denied 451 U.S. 937, 101 S. Ct. 2015, 68 L. Ed. 2d 323 (1981); Davis v. C & M Tractor Co., 2 Ark. App. 150, 617 S.W.2d 382 (1981); Watling Ladder Co. v. Aldridge, 3 Ark. 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EOC*, 291 Ark. 265, 724 S.W.2d 163 (1987); *Gladden v. Arkansas Children's Hosp.*, 292 Ark. 130, 728 S.W.2d 501 (1987); *Cox v. Farrell*, 292 Ark. 177, 728 S.W.2d 954 (1987); *Schlemmer v. Fireman's Fund Ins. Co.*, 292 Ark. 344, 730 S.W.2d 217 (1987); *Free v. State*, 293 Ark. 65, 732 S.W.2d 452 (1987); *T.P. Leasing Corp. v. Baker Leasing Corp.*, 293 Ark. 166, 732 S.W.2d 480 (1987); *Terry ex rel. Christian Book Ctr., Inc. v. Taylor*, 293 Ark. 237, 737 S.W.2d 437 (1987); *Phillips v. Lavalle*, 293 Ark. 364, 737 S.W.2d 652 (1987); *Redding v. State*, 293 Ark. 411, 738 S.W.2d 410 (1987); *Cash v. Holder*, 293 Ark. 537, 739 S.W.2d 538 (1987); *Springdale Bd. of Educ. v. Bowman*, 294 Ark. 66, 740 S.W.2d 909 (1987); *Wagoner v. Wagoner*, 294 Ark. 82, 740 S.W.2d 915 (1987); *Novak v. State*, 294 Ark. 120, 741 S.W.2d 243 (1987); *Wilson v. Wilson*, 294 Ark. 194, 741 S.W.2d 640 (1987); *Shamlin v. State*, 23 Ark. App. 39, 743 S.W.2d 1 (1988), cert. denied 488 U.S. 863, 109 S. Ct. 163, 102 L. 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State*, 299 Ark. 503, 744 S.W.2d 830 (1989); *Tate v. Sharpe*, 300 Ark. 126, 777 S.W.2d 215 (1989); *Crawford/Sebastian County Scan v. Kelly*, 300 Ark. 206, 778 S.W.2d 219 (1989), overruled *Arkansas Dep't of Human Servs., St. Francis Div. of Children & Family Servs. v. Thompson*, 959 S.W.2d 46 (1998); *State v. Tipton*, 300 Ark. 211, 779 S.W.2d 138 (1989); *Burns v. State*, 300 Ark. 469, 780 S.W.2d 23 (1989); *Culpepper v. Smith*, 302 Ark. 558, 792 S.W.2d 293 (1990), questioned *Newton v. Etoch*, 332 Ark. 325, 965 S.W.2d 96 (1998); *Smith v. Ferguson*, 302 Ark. 388, 790 S.W.2d 162 (1990); *State v. Shepherd*, 303 Ark. 447, 798 S.W.2d 45 (1990); *Muddiman v. Wall*, 33 Ark. App. 175, 803 S.W.2d 945 (1991); *Paul M. v. Teresa M.*, 36 Ark. App. 116, 818 S.W.2d 594 (1991); *Department of Human Servs. ex rel Davis v. Seamster*, 36 Ark. App. 202, 820 S.W.2d 298 (1991); *Ryder Truck Rental, Inc. v. Sutton*, 305 Ark. 374, 807 S.W.2d 909 (1991); *Schmidt v. Gibbs*, 305 Ark. 383, 807 S.W.2d 928 (1991); *Citicorp Indus. Credit, Inc. v. Wal-Mart Stores, Inc.*, 305 Ark. 530, 809 S.W.2d 815 (1991); *Gatlin v. Gatlin*, 306 Ark. 146, 811 S.W.2d 761 (1991); *Bean v. Nelson*, 307 Ark. 24, 817 S.W.2d 415 (1991); *Nixon v. H & C Elec. Co.*, 307 Ark. 154, 818 S.W.2d 251 (1991); *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 307 Ark. 171, 818 S.W.2d 935 (1991); *Szalay v. Hancock*, 307 Ark. 232, 819 S.W.2d 232 (1991); *Edwards v. ABC Div. Bd.*, 307 Ark. 245, 819 S.W.2d 245 (1991); *Smackover State Bank v. Oswald*, 307 Ark. 432, 821 S.W.2d 757 (1991); *Arkansas Dep't of Human Servs. v. Caldwell*, 39 Ark. App. 14, 832 S.W.2d 510 (1992); *White v. Zini*, 39 Ark. App. 83, 838 S.W.2d 370 (1992); *Giacona v. State*, 39 Ark. App. 101, 839 S.W.2d 228 (1992); *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992); *McGee v. Armored Pub. Schs.*, 309 Ark. 59, 827 S.W.2d 137 (1992);

State v. Torres, 309 Ark. 422, 831 S.W.2d 903 (1992); State v. Schaub, 310 Ark. 76, 832 S.W.2d 843 (1992); Guy v. Breeko Corp., 310 Ark. 187, 832 S.W.2d 816 (1992), cert. denied 506 U.S. 940, 113 S. Ct. 377, 121 L. Ed. 2d 288 (1992); Bangs v. State, 310 Ark. 235, 835 S.W.2d 294 (1992); Roe v. State, 310 Ark. 490, 837 S.W.2d 474 (1992); Lancaster v. Fitzhugh, 310 Ark. 590, 839 S.W.2d 192 (1992); Sanders v. State, 310 Ark. 630, 839 S.W.2d 518 (1992); Sutter v. King, 310 Ark. 681, 839 S.W.2d 218 (1992); Smith v. Leonard, 310 Ark. 782, 840 S.W.2d 167 (1992); Atkinson v. Lofton, 311 Ark. 56, 842 S.W.2d 425 (1992); Integon Indem. Corp. v. Bull, 311 Ark. 61, 842 S.W.2d 1 (1992); Wood v. White, 311 Ark. 168, 842 S.W.2d 24 (1992); Bushong v. Garman Co., 311 Ark. 228, 843 S.W.2d 807 (1992); State v. Long, 311 Ark. 248, 844 S.W.2d 302 (1992); 215 Club v. Devore, 311 Ark. 309, 843 S.W.2d 317 (1992); Butler v. State, 311 Ark. 334, 842 S.W.2d 435 (1992) (preceding decisions under prior rule) McKinley v. Arkansas, Dep't of Human Servs., 311 Ark. 382, 844 S.W.2d 366 (1993); State v. Post, 311 Ark. 510, 845 S.W.2d 487 (1993); Brenk v. State, 311 Ark. 579, 847 S.W.2d 1 (1993), appeal dismissed 316 Ark.

249, 871 S.W.2d 372 (1994); Franklin v. State, 311 Ark. 601, 845 S.W.2d 525 (1993); Campbell v. State, 311 Ark. 641, 846 S.W.2d 639 (1993); Johnson v. State, 312 Ark. 38, 846 S.W.2d 662 (1993); Reed v. State, 312 Ark. 82, 847 S.W.2d 34 (1993); American Cas. Co. v. Mason, 312 Ark. 166, 848 S.W.2d 392 (1993); Pyle v. State, 314 Ark. 165, 862 S.W.2d 823 (1993), cert. denied 510 U.S. 1197, 114 S. Ct. 1306, 127 L. Ed. 2d 657 (1994) (decision under prior rule) Warren v. State, 314 Ark. 192, 862 S.W.2d 222 (1993); Smith v. Walt Bennett Ford, Inc., 314 Ark. 591, 864 S.W.2d 817 (1993); State v. Murphy, 315 Ark. 68, 864 S.W.2d 842 (1993); Arkansas Emp. Sec. Dep't v. Mellon, 322 Ark. 715, 910 S.W.2d 699 (1995); Liberty Mut. Ins. Co. v. Thomas, 333 Ark. 655, 971 S.W.2d 244 (1998); Cleek v. Great S. Metals, 335 Ark. 342, 981 S.W.2d 529 (1998); Stewart v. State, 338 Ark. 608, 999 S.W.2d 684 (1999); Barbee v. State, 346 Ark. 185, 56 S.W.3d 370 (2001); Mann v. State, 357 Ark. 159, 161 S.W.3d 826 (2004); Crawford County v. Jones, 365 Ark. 585, 232 S.W.3d 433 (2006); Deaver v. Faucon Props., 367 Ark. 288, 239 S.W.3d 525 (2006); Parker v. Johnson, 368 Ark. 190, 244 S.W.3d 1 (2006).

ARTICLE III. THE RECORD

Rule 3-1. Preparation of the record.

(a) *Generally.* All records shall begin with the style of the court in which the controversy was heard, the name of the judge presiding when the decree, judgment or order was rendered and its date, the names of all the parties litigant, and the nature of the suit or motion. For example: "Trial before A.B., judge of the circuit court on the _____ day of _____, _____;

John Doe, Plaintiff

vs.

Action on Promissory Note"

Jane Doe, Defendant

(b) *Dates.* Whenever an order of the court is mentioned, the date shall be specifically stated, rather than by reference to the day and year "aforesaid".

(c) *Duplications.* No part of the record shall be copied more than once. When a particular record recurs, a reference should be made to pages in the preceding part of the record.

(d) *Depositions.* When depositions are taken on interrogatories and included in the record, the answers must be placed immediately after the questions to which they are responsive.

(e) *Record on second appeal.* When a cause has been once before the Court and a record is again required (for the purpose of correcting error which occurred on retrial), the second record shall begin where the former ended; that is, with the judgment of the appellate court, which should be entered of record in the circuit court, omitting the opinion of the appellate court. The appeal or supersedeas bond should be the last entry included.

(f) *Table of contents.* Every record shall include a table of contents which refers to the pages in the record where the matter identified is copied. For example:

Complaint	Page 1
Answer	Page 4
Motion for Summary Judgment	Page 6
• Exhibit A — Medical Records (completely redacted and filed under seal, Pages 8S15)	
Brief in Support of Summary Judgment (internal redactions with complete version filed under seal)	Page 16
Response to Motion for Summary	Page 27
• Exhibit A — Medical Records (internal redactions with complete version filed under seal)	Page 29
Brief Opposing Summary Judgment	Page 34
Judgment	Page 45
Notice of Appeal	Page 47
Transcript of Hearing	Page 49

The record shall be consecutively paginated, including any papers under seal. The table of contents shall also list all documents filed under seal.

(g) *Fee for index.* Clerks may add to their fee for the record a reasonable charge for these items where no charge is fixed by statute.

(h) *Record fee and costs certified.* The fee for the production of the record must be certified in all cases; in addition, all costs in the circuit court must be reported, and by whom paid.

(i) *Clerk's record and reporter's transcript — Paper size and preparation.* The transcript must be prepared in plain typewriting or computer or word processor printing of the first impression, not copies, on 8½" x 11" paper. The record, as defined in paragraph (m) [paragraph (n)] of this Rule, shall be fastened on the left of the page. All transcripts shall be prepared by certified court reporters and comport with the following rules:

- (1) No fewer than 25 typed lines on standard 8½" x 11" paper;
- (2) No fewer than 9 or 10 characters to the typed inch;
- (3) Left-hand margins to be set at no more than 1¾";
- (4) Right-hand margins to be set at no more than ¾";
- (5) Each question and answer to begin on a separate line;
- (6) Each question and answer to begin at the left-hand margin with no more than 5 spaces from the "Q" and "A" to the text;
- (7) Carry-over "Q" and "A" lines to begin at the left-hand margin;
- (8) Colloquy material, quoted material, parentheticals and exhibit markings to begin no more than 15 spaces from the left-hand margin with carry-over lines to begin no more than 10 spaces from the left-hand margin;
- (9) All transcripts to be prepared in the lower case;
- (10) All depositions prepared for use as evidence in any court to comply with these Rules, except that the lefthand margin is to be set at no more than 1¾" and bound on the left.

(j) *Exhibits.* Documents of unusual bulk or weight shall not be transmitted by the clerk of the circuit court unless the clerk is directed to do so by a party or by the Clerk of the Court. Physical exhibits other than documents shall not be transmitted by the clerk of the circuit court except by order of the Court.

(k) *Folding of record.* Records must be transmitted to the Clerk without being folded or creased.

(l) *Surveys.* Real property surveys which form a part of the record shall not be fastened to the record.

(m) *Record in volumes.* Where the record is too large to be conveniently bound in one volume, it shall be divided into separate volumes of convenient size and numbered sequentially.

(n) *Definition of record.* The term “record” in civil cases, and as used in these Rules, refers only to the pleadings, judgment, decree, order appealed, transcript, exhibits, and certificates. (Amended June 7, 2001, effective July 1, 2001; amended October 23, 2008, effective January 1, 2009.)

Explanatory Note: The rule has been amended to illustrate how to handle and compile material under seal because it has been redacted. Records have long been consecutively paginated, and that practice is now reflected in the amended rule. Material under seal should be reflected in the table of contents. If a pleading, motion, brief, or other paper contains some internal redactions, that fact should be noted in the table of contents. The complete version of the paper under seal

should contain the same appeal-record page numbers as the redacted version in the publicly available file. If a document has been redacted completely, then the public file should contain the name of the document and a list of the pages redacted. For multi-page redactions, the unredacted copy under seal should contain page numbering that fills the gap left in the public court record, as shown in the example above for motion exhibit A.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

CASE NOTES

ANALYSIS

Contents of record.
Reporter's transcript.

Contents of Record.

In a termination of parental rights appeal under this rule and Ark. Sup. Ct. & Ct. App. R. 3-2, the “entire record” could be properly prepared and transmitted by the circuit clerk without including the case plan, even though the plan had in fact been filed in accordance with § 9-27-402(c)(5)(A); it was the mother's burden to bring up an adequate record for review and, because the record omitted the case plan, the court could not review the mother's due process claim. *Rodriguez v. Ark. Dep't of Human Servs.*, 360 Ark. 180, 200 S.W.3d 431 (2004).

Reporter's Transcript.

Failure by the court reporter to transcribe the proceedings of a two-day trial within the time prescribed by the rules is inexcusable. *Franklin v. State*, 318 Ark. 324, 885 S.W.2d 23 (1994).

Court granted appellant's motion for rule on the clerk seeking an order that clerk accept

a transcript and record for filing which had not been certified by a court reporter because, by the time the record was to be prepared and certified for filing, the court reporter was no longer certified, provided the attorneys of record certified to the clerk, by affidavit, that the transcripts were true, accurate, and complete; the court stated that under other facts, this remedy might not be available. *Cranfill v. Union Planters Bank, N.A.*, 354 Ark. 397, 123 S.W.3d 122 (2003).

Clerk of the appellate court properly rejected appellant's transcript and record because they were not properly certified as required by subsection (i) of this rule; however, the court granted appellant's motion for rule on the clerk seeking an order that the clerk accept a transcript and record for filing that had not been certified on the condition that the parties' counsel certify by affidavit that the transcripts were true, accurate, and complete where the trial court reporter had been certified at the time of trial but was no longer certified at the time of the appeal. *Mangrum v. Pigue*, 354 Ark. 477, 125 S.W.3d 194 (2003).

Rule 3-2. Items to be omitted from the record.

(a) *Generally.* The clerks of the circuit courts in making records to be transmitted to the Court, shall, unless excepted by the provisions of this Rule, include all matters in the record as required by Rule 3-1(n).

(b) *Summons.* In cases where the defendant has appeared, the clerk shall not set out any summons or other writ of process for appearance or the return thereof, but shall state: "Summons issued", (showing date) "and served", (showing date).

(c) *Amended pleadings.* In case of an amendment to the pleadings by substitution, the clerks shall treat the amended pleading as the only one and shall refrain from copying into the records any pleadings withdrawn, waived or superseded by amendment, unless it is expressly called for by a party's designation of the record.

(d) *Incidental matters.* Clerks shall not insert in the record any matter concerning the organization or adjournment of court, the impaneling or swearing of the jury, the names of jurors, including any motion, affidavit, or order or ruling in reference thereto, any continuance or commission to take testimony or the return thereto, any notice to take depositions or the caption or certificate of the officer before whom such depositions are taken, or any other incidental matter, unless it is expressly called for by a party's designation of the record. (Amended June 7, 2001, effective July 1, 2001.)

RESEARCH REFERENCES

Ark. L. Rev. Criminal Procedure — Specificity of Objection, 28 Ark. L. Rev. 406.

CASE NOTES**Case Plans.**

In a termination of parental rights appeal under this rule and Ark. Sup. Ct. & Ct. App. R. 3-1, the "entire record" could be properly prepared and transmitted by the circuit clerk without including the case plan, even though the plan had in fact been filed in accordance

with § 9-27-402(c)(5)(A); it was the mother's burden to bring up an adequate record for review and, because the record omitted the case plan, the court could not review the mother's due process claim. *Rodriguez v. Ark. Dep't of Human Servs.*, 360 Ark. 180, 200 S.W.3d 431 (2004).

Rule 3-3. Record in civil cases.

Not all records in civil cases will have the same contents. To the extent possible, items will be arranged in the following sequence:

1. The Complaint;
2. Plaintiff's exhibits which accompany the Complaint;
3. Statement regarding summons, set out in Rule 3-2(b);
4. Answer;
5. Defendant's exhibits which accompany the Answer;
6. Subsequent pleadings and orders in chronological order;
7. Final judgment, decree, or order appealed;
8. Post-judgment decree, order or motion (e.g., motions for new trial);
9. Orders granting or denying post-judgment motions;
10. Notice of appeal and designation of record;
11. Statement of points to be relied upon if abbreviated record designated;
12. Extensions of time to file record on appeal;

13. Stipulations to abbreviated records;
14. Narrative of testimony upon stipulations;
15. Depositions introduced;
16. Reporters' transcription of testimony;
17. Supersedeas bond;
18. Certificate, duly acknowledged;
19. Certificate of costs, indicating payor.

CASE NOTES

Stipulations.

A stipulation is a name given to any agreement made by the attorneys engaged on opposite sides of a cause (especially if in writing) regulating any matter incidental to the pro-

ceedings or trial, which falls within their jurisdiction; a document is not a stipulation if not signed by both sides. *McClard v. Crain Mgt. Group, Inc.*, 313 Ark. 472, 855 S.W.2d 929 (1993).

Rule 3-4. Record in criminal cases.

(a) *Order of record.* In all criminal cases, after the caption set forth in Rule 3-1, the record shall be organized in the following sequence:

1. Return of the indictment or information;
2. Defendant's pleadings;
3. Subsequent pleadings and orders in chronological order;
4. Final judgment and commitment or order appealed;
5. Motion for new trial, to set aside, amend, etc.;
6. Order granting or denying above motions;
7. Notice of appeal and designation of record;
8. Extensions of time to file record on appeal;
9. Reporters' transcription of testimony;
10. Appeal bond;
11. Certificate, duly acknowledged.

(b) *Record of jury matters.* The record shall not include the impaneling or swearing of the jury, the names of the jurors, or any motion, affidavit, order, or ruling in reference thereto unless expressly called for by a party's designation of the record.

(c) *Exhibits.* Photographs, charts, drawings and other documents that can be inserted into the record shall be included. Documents of unusual bulk or weight shall not be transmitted by the clerk of the circuit court unless the clerk is directed to do so by a party or by the Clerk of the Court. Physical evidence, other than documents, shall not be transmitted unless directed by an order of the Court. (Amended June 7, 2001, effective July 1, 2001.)

CASE NOTES

ANALYSIS

Defendant's pleadings.
Voir dire.

Defendant's Pleadings.

Because Arkansas allows a motion to be filed by handing it to a judge who then keeps it and rules on it, and because Arkansas requires court clerks to include all of the defendant's filed motions in the record sent to the state Supreme Court on appeal, defendant could not have anticipated that the Arkansas Supreme Court would refuse to con-

sider his inadequate-notice claim because the formal record omitted his pro se motion; however, unexpected state procedural bars are not adequate to foreclose federal review of constitutional claims. *Forgy v. Norris*, 64 F.3d 399 (8th Cir. 1995).

Voir Dire.

Although defendant requested in his notice of appeal that the record not contain a transcript of general and individual voir dire, the better approach would have been to provide the Court with a complete record where a term of life imprisonment was imposed; the

impaneling or swearing of the jury, the names of the jurors, or any motion, affidavit, order, or ruling in reference thereto is not transcribed unless expressly called for by a party's designation of the record and, if the matters are not

transcribed, the Court is left to assume that there were no adverse rulings. *Ellis v. State*, 366 Ark. 46, 233 S.W.3d 606 (2006).

Cited: *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004).

Rule 3-5. Certiorari to complete the record.

(a) *Authorization for writ of certiorari.* When jurisdiction is conferred by filing, within the time allowed for appeal, a dated and certified copy of the order or judgment appealed from, the Clerk may, upon authorization by the Court, issue a writ of certiorari to the clerk of the circuit court, the reporter, or any other person charged with the duty of preparing the record on appeal, directing that any omissions or errors in the record be corrected.

(b) *Contents of writ.* The writ shall order that the record be completed and certified within thirty days, and the explanation for any default in complying with the writ must be made on the return within the time directed. This procedure may be used in appeals of civil, criminal, and administrative agency or commission cases. (Amended June 7, 2001, effective July 1, 2001.)

CASE NOTES

ANALYSIS

Extension of time.

Illustrative cases.

Extension of Time.

Writ of certiorari was granted to petitioner in a kidnapping and attempted rape case allowing petitioner an additional 30 days to complete the record because, although the deadline for preparation of the record had been extended by 120 days, the record was still not completed. *Mitchem v. State*, 363 Ark. 451, 214 S.W.3d 855 (2005).

Illustrative Cases.

Where defendant was convicted of capital murder and there were three eyewitnesses, and where pursuant to a writ of certiorari the court reporter returned the writ without the original photo lineup and instead tendered a black-and-white photocopy, and where defendant moved for summary reversal of his conviction based upon the omission of the original photo array, defendant had failed to object to the eyewitnesses' in-court identifications at trial, and because defendant's only point on appeal would have been procedurally barred,

the appellate court held that the record on appeal was sufficient without the original photo array. *Lewis v. State*, 354 Ark. 359, 123 S.W.3d 891 (2003).

In an action filed under the Arkansas Freedom of Information Act, §§ 25-19-101 — 109, appellant failed to show that he was entitled to stay the appeal to address alleged errors in the transcript; while appellant handed two documents to the trial judge during the hearing, he failed to introduce the documents into evidence and they did not become part of the record. An error in the file number and references to appellant as "defendant" did not create any confusion in reading the transcript; therefore, appellant failed to establish that a writ of certiorari should be granted pursuant to this rule *Loveless v. Tucker*, 2009 Ark. 424, — S.W.3d —, 2009 Ark. LEXIS 542 (2009).

Cited: *Evans v. Northwest Tire Serv.*, 21 Ark. App. 75, 728 S.W.2d 523 (1987); *Wortham v. Director of Labor*, 31 Ark. App. 175, 790 S.W.2d 909 (1990) (preceding decisions under prior rule); *Williams v. State*, 323 Ark. 568, 916 S.W.2d 113 (1996).

Rule 3-6. Disposal of record and exhibits.

(a) *Procedure to obtain — Failure to return.* Attorneys may obtain from the Clerk the record in a disposed of case by giving a receipt and may retain the record for a period of not more than thirty days. No extension of time will be granted until the record has been returned, and then only upon order of the Court. Upon failure to return the record within the time allotted, the Clerk shall demand its return. If the demand is not complied with within ten days, the delinquency shall be reported to the Court at which time a citation

shall issue commanding the attorney to appear before the Court immediately and show cause why a citation for contempt should not issue.

(b) *Failure to claim exhibits in civil cases.* All exhibits filed in civil cases and not attached to the transcript, in the Supreme Court and Court of Appeals, must be claimed by the party who presented the exhibit to the circuit court and be removed from the Clerk's office within 90 days from the date the mandate is issued. The attorney receiving the exhibits must sign the docket showing their receipt. If an exhibit is not claimed within the 90 days, the Clerk may destroy or dispose of it after giving the parties, or the attorneys of record, 30 days notice of the Clerk's intention to do so.

(c) *Exhibits in criminal cases.*

(1) Exhibits in cases in which the mandate has been issued for more than five years shall be disposed of in the following manner:

(A) Physical exhibits consisting of weapons, in whatever form, shall be transferred to the U.S. Bureau of Alcohol, Tobacco & Firearms for disposal pursuant to Bureau policy.

(B) Controlled substances, in whatever form, shall be transferred to the Arkansas Department of Health for disposal pursuant to Department policy.

(C) All other exhibits, except those contained in the record, may be destroyed at the discretion of the Clerk.

(2) All exhibits shall be retained in cases that are subject to continuing litigation or in which the defendant received a sentence of death.

(3) Exhibits in cases which are reversed on appeal shall be transferred to the Office of the Prosecutor Coordinator when the mandate from the Court issues. (Amended June 7, 2001, effective July 1, 2001.)

CASE NOTES

Cited: Carroll v. Carroll, 33 Ark. App. 133, 802 S.W.2d 932 (1991) (decision under prior rule).

ARTICLE IV. BRIEFS

Rule 4-1. Style of briefs.

(a) *Briefs — Size — Paper — Type.* All briefs shall be type written or produced with computer or word processing equipment. Briefs shall be of uniform size on opaque, unglazed 8½" x 11" white paper and firmly bound on the left hand margin by staples or other binding devices. If staples are used, they should be covered by tape. Briefs shall be double-spaced, except for quoted material, which may be single-spaced and indented. Footnote lines, except quotations, shall be double-spaced. Use of footnotes is not encouraged and should be used sparingly. Carbon copies are not acceptable, but copies produced by offset printing, positive photocopy, or other dry photo-duplicating process which produces a clearly legible black-on-white reproduction may be used. The abstract, statement of the case, argument, and addendum shall each be numbered sequentially from page one, and both sides of the page may be used. The margin at the top, outer edge, and bottom of each page shall be not less than one inch, and the margin at the binding edge shall be wide enough to allow the text to be read easily. Typeface shall be proportionally spaced, shall not be less than 14 points, and must include serifs, but sans-serif type may be used in headings and captions. Commer-

cial organizations or members of the bar maintaining equipment for duplicating may submit to the Clerk samples for prior approval. If the Clerk is satisfied that such duplicating process will produce documents which conform to the specifications of this rule, it will be approved.

(b) *Length of argument.* Unless leave of the court is first obtained, the argument portion of a brief shall not exceed 30 double-spaced pages including the conclusion, if any. The appellant's reply brief shall not exceed 15 double-spaced pages and shall not include any supplemental abstract unless permitted by the court upon motion. Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this rule has been made. The motion must specify the number of additional pages requested.

(c) *Pro se briefs.* Where the appellant in a criminal appeal is entitled to representation by counsel, pro se briefs will be accepted only when the appellant has filed an affidavit stating that the appellant has knowingly and intelligently refused the services of an attorney on appeal. Such a brief shall also be accompanied by an affidavit that the appellant has prepared it without the paid assistance of any other prison inmate.

(d) *Compliance with Administrative Order No. 19 required.* All parts of all briefs, including the abstract and any document attached to any brief in the addendum, must comply with the protective requirements for confidential information established by Administrative Order No. 19. Counsel and unrepresented parties shall follow the redaction and filing procedure established by Arkansas Rule of Civil Procedure 5(c)(2)(A) & (B). That procedure includes (1) eliminating all unnecessary or irrelevant confidential information; (2) redacting all necessary and relevant confidential information; and (3) filing an unredacted version under seal. If the record contains confidential information that is neither necessary nor relevant for the appellate court's consideration of the case, then the party shall omit that information throughout the brief, including the abstract and addendum. If confidential information is integrated with necessary information, then the party should redact the confidential information in the abstract and addendum. In this situation, the party need not file an unredacted version of the brief. If the confidential information is necessary and relevant to a decision on appeal, pursuant to Rule 4-4, the party must file nine redacted copies and nine unredacted copies of the brief for a total of eighteen copies. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(e) *Noncompliance.* Briefs not in compliance with this rule shall not be accepted by the Clerk. When a party submits a brief on time that substantially complies with the rules, the Clerk may mark the brief "tendered," grant the party a seven-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received. (Amended March 27, 1995; amended May 8, 2003; amended May 29, 2003; amended October 23, 2008, effective January 1, 2009; amended December 11, 2008, effective January 1, 2009; amended October 29, 2009, effective January 1, 2010; amended June 3, 2010, effective July 1, 2010.)

Publisher's Notes. The Arkansas Supreme Court issued the following Per Curiam on February 13, 1978: "PER CURIAM. In

recent years a practice has grown up by which counsel attach to their abstracts and briefs typewritten, photographed, or Xeroxed copies

of *written* exhibits, such as deeds, insurance policies and similar instruments or documents. This practice is contrary both to Rules 8 and 11 [now Rules 4-1 and 4-3], which require that abstracts and briefs be *printed*, and to Rule 9 (d) as amended on February 9, 1976 [now Rule 4-2(6)], which provides for the attachment of only those exhibits 'which can-

not be abstracted in words.' Counsel's failure to abstract such exhibits frequently makes it impossible for the member of the court to properly consider the exhibits as reproduced. Effective April 1, 1978, the clerk will not accept abstracts and briefs not complying in this respect with the court's rules."

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

CASE NOTES

ANALYSIS

Abstracts and briefs.
Compliance required.
Contents of abstract.
Handwritten briefs.
Length of briefs.
Premature pro se brief.
Pro se motion insufficient.
Stays.
Supplemental pro se brief.
Waiver of counsel.
Withdrawal of counsel's brief.

Abstracts and Briefs.

The use of typewritten, photographed, or xeroxed copies of written exhibits, such as deeds, insurance policies, and similar instruments or documents is contrary to the requirement that abstracts and briefs be printed. *Lewis v. Miller*, 263 Ark. 154, 563 S.W.2d 435 (1978) (decision under prior rule).

On appeal of an order granting summary judgment, appellant submitted a brief without a proper abstract in violation of Ark. Sup. Ct. & Ct. App. R. 4-2; the abstract was not in the first person; and the line spacing appeared to be between single-spaced and double-spaced in violation of subsection (a) of this rule. A rebriefing was ordered to correct these problems. *Wilkins & Assocs. v. Vimy Ridge Mun. Water Improvement Dist. No. 139*, 372 Ark. 117, 270 S.W.3d 869 (2008).

Compliance Required.

Where appellant's brief lacked a jurisdictional statement as required by S. Ct. and Ct. App. Rule 4-2(a)(2), the abstract portion of appellant's brief was in large portion single-spaced in contravention of subsection (a) of this rule, deposition testimony which appeared to be quoted verbatim was neither single space nor indented, the abstract contained information that was clearly unnecessary for determination of the issues presented, but was lacking information that is pertinent, and appellant failed to abstract the notice of appeal as well as the order of the trial court, the abstract was insufficient.

Trapp v. Economy Eng'g Co., 316 Ark. 89, 871 S.W.2d 345 (1994).

Court could not reach the merits of insurance company's appeal because of the company's failure to comply with the court's addendum requirements pursuant to this rule and Ark. Sup. Ct. & Ct. App. R. 4-2; the company failed to include, among other necessary and missing pleadings, the company's motion and brief for partial summary judgment, the insured's response to the motion, and the company's reply to the insured's response. *Unum Life Ins. Co. of Am. v. Edwards*, 361 Ark. 150, 205 S.W.3d 126 (2005).

Contents of Abstract.

Where four pages of the abstract were single-spaced in violation subsection (a) of this rule, and certain material testimony was omitted in violation of S. Ct. & Ct. App. R. 4-2, but the omitted material was supplied by the state in a supplemental abstract, the abstract was held not to be flagrantly deficient. *Johnson v. State*, 319 Ark. 3, 888 S.W.2d 661 (1994).

Handwritten Briefs.

Where a pro se appellant submits a motion for permission to file a handwritten brief in which he makes a substantial showing that his suit has merit and that he is unable to submit a typed brief, the Supreme Court will accept a legible handwritten brief. *Glick v. Lockhart*, 288 Ark. 417, 706 S.W.2d 178 (1986); *Hayes v. Lockhart*, 288 Ark. 419, 706 S.W.2d 179 (1986); *Patterson v. Smith*, 289 Ark. 564, 712 S.W.2d 922 (1986) (preceding decisions under prior rule).

There is no absolute right to file a handwritten brief on appeal; however, if a pro se appellant makes a substantial showing that he is entitled to relief and that he does not have access to a typewriter, the appellate court will accept a legible handwritten brief. *Miner v. Furman*, 318 Ark. 883, 887 S.W.2d 310 (1994).

Where appellants stated in conclusory fashion that the appeal had merit, with no show-

ing that there was substantial merit to the appeal, the request to file a handwritten brief was denied. *Miner v. Furman*, 318 Ark. 883, 887 S.W.2d 310 (1994).

Length of Briefs.

Occasionally the court will grant a waiver of the 25-page limit, but only if the party can demonstrate that the limits cannot in fairness be met. *Pemberton v. State*, 291 Ark. 198, 723 S.W.2d 372 (1987) (decision under prior rule).

Where the appellants submitted a supplemental brief that was 10 pages in length and contained 28 single-spaced footnotes, one of which exceeded two full pages of text, the court struck the brief and ordered the appellants to resubmit a supplemental brief that conformed with the rule. *Bharodia v. Pledger*, 339 Ark. 89, 2 S.W.3d 783 (1999).

Pursuant to its authority under Ark. Sup. Ct. & Ct. App. R. 4-2(b)(3) to reach sua sponte issues of deficiencies in briefs, the court did not reach the merits of an appeal because of appellant's failure to comply with this rule; appellant's brief was not double-spaced as required by this rule, thus resulting in a brief that exceeded 25 pages of text. The court ordered rebriefing by appellant. *Nash v. Ark. Elevator Safety Bd.*, 370 Ark. 86, 257 S.W.3d 80 (2007).

Premature Pro Se Brief.

Where defendant was assigned counsel who had not yet filed a brief in his behalf, defendant's motion to file a supplemental pro se brief was premature since he had not read his attorney's brief. *Wade v. State*, 288 Ark. 94, 702 S.W.2d 28 (1986) (decision under prior rule).

Pro Se Motion Insufficient.

Motion to proceed pro se on appeal was insufficient where defendant did not indicate whether he could submit a typewritten brief as required by the rules and did not submit an affidavit refusing services of an attorney on appeal in accordance with subsection (d) of this rule. *Gay v. State*, 289 Ark. 236, 713 S.W.2d 232 (1986) (decision under prior rule).

Stays.

This rule does not provide a standard by which the appellate court is to consider requests for stays of trial court orders, but the implication is that the appellate court has discretionary authority to issue a stay. *Smith v. Denton*, 313 Ark. 463, 855 S.W.2d 322

(1993) (decision under prior rule).

Supplemental Pro Se Brief.

The Supreme Court will permit an appellant to submit a pro se supplemental brief if the appellant can demonstrate that the attorney has omitted an issue on which he or she is likely to prevail. *Locklear v. State*, 290 Ark. 70, 716 S.W.2d 766 (1986) (decision under prior rule).

Waiver of Counsel.

To enter a voluntary and intelligent waiver of counsel, the appellant must indicate in his motion to proceed pro se that at least he is aware of the right to counsel and that he understands the advantages of being represented by counsel and the disadvantages of self-representation. *Gidron v. State*, 312 Ark. 517, 850 S.W.2d 331 (1993) (decision under prior rule).

Withdrawal of Counsel's Brief.

Where the defendant was appointed competent counsel and he chose to refuse her assistance by voluntarily electing to exercise his right to represent himself, the brief filed by counsel was withdrawn when counsel was relieved; therefore, the defendant cannot adopt counsel's brief but substitute his own argument on one point for the argument written by counsel. *Wade v. State*, 288 Ark. 473, 706 S.W.2d 392 (1986) (decision under prior rule).

Cited: *Bank of Ozark v. Isaacs*, 263 Ark. 113, 563 S.W.2d 707 (1978); *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979); *Green v. State*, 276 Ark. 313, 634 S.W.2d 140 (1982); *Long v. State*, 281 Ark. 194, 662 S.W.2d 811 (1984); *Beaumont v. Robinson*, 282 Ark. 181, 668 S.W.2d 514 (1984); *Jackson v. Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984); *Linell v. State*, 283 Ark. 162, 671 S.W.2d 741 (1984), cert. denied 470 U.S. 1062, 105 S. Ct. 1778, 84 L. Ed 2d 837 (1985); *Tandy Corp. v. Bone*, 283 Ark. 399, 678 S.W.2d 312 (1984), limited *City of Green Forest v. Morse*, 316 Ark. 540, 873 S.W.2d 155 (1994); *Remeta v. State*, 298 Ark. 436, 771 S.W.2d 249 (1989); *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 332, 788 S.W.2d 742 (1990) (preceding decisions under prior rule); *Jones v. Jones*, 320 Ark. 157, 896 S.W.2d 431 (1995); *Daffron v. State*, 325 Ark. 411, 926 S.W.2d 662 (1996); *Gaines v. State*, 350 Ark. 535, 88 S.W.3d 858 (2002); *Kyzar v. City of W. Memphis*, 359 Ark. 366, 197 S.W.3d 502 (2004).

Rule 4-2. Contents of briefs.

(a) *Contents.* The contents of the brief shall be in the following order:

(1) *Table of contents.* Each brief must include a table of contents. It should reference the page number for the beginning of each of the major sections identified in Rule 4-2(a)(2)-(8). The table must also list the contents of the

abstract and the addendum. The name of each witness, and the abstract page number on which his or her testimony begins, must be included. The table must identify each document in the addendum, list the addendum page number where the document begins, and list the corresponding record page number.

(2) *Informational statement and jurisdictional statement.* The Informational Statement and Jurisdictional Statement required by Supreme Court Rule 1-2(c).

(3) *Points on appeal.* The appellant shall list and separately number, concisely and without argument, the points relied upon for a reversal of the judgment or decree. The appellee must follow the same sequence and arrangement of points as contained in the appellant's brief and may then state additional points. Either party may insert under any point not more than two citations which the party considers the principal authorities on that point.

(4) *Table of authorities.* The table of authorities shall be an alphabetical listing of authorities with a designation of the page number of the brief on which the authority appears. The authorities shall be grouped as follows:

- (A) Cases
- (B) Statutes and Rules
- (C) Books and Treatises
- (D) Miscellaneous

(5) *Abstract.* The appellant shall create an abstract of the material parts of all the transcripts (stenographically reported material) in the record. Information in a transcript is material if the information is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal.

(A) *Contents.* All material information recorded in a transcript (stenographically reported material) must be abstracted. Depending on the issues on appeal, material information may be found in, for example, counsel's statements and arguments, voir dire, testimony, objections, admissions of evidence, proffers, colloquies between the court and counsel, jury instructions (if transcribed), and rulings. All material parts of all hearing transcripts, trial transcripts, and deposition transcripts must be abstracted, even if they are an exhibit to a motion or other paper. Exhibits (other than transcripts) shall not be abstracted. Instead, material exhibits shall be copied and placed in the addendum. If an exhibit referred to in the abstract is in the addendum, then the abstract shall include a reference to the addendum page where the exhibit appears.

(B) *Form.* The abstract shall be an impartial condensation, without comment or emphasis, of the transcript (stenographically reported material). The abstract must not reproduce the transcript verbatim. No more than one page of a transcript shall be abstracted without giving a record page reference. In abstracting testimony, the first person ("I") rather than the third person ("He or She") shall be used. The question-and-answer format shall not be used. In the extraordinary situations where a short exchange cannot be converted to a first-person narrative without losing important meaning, however, the abstract may include brief quotations from the transcript.

(C) *Miscellaneous.* (i) In a second or subsequent appeal, material information from all transcripts filed in any prior appeal must be abstracted. (ii) If an abstract exceeds two hundred fifty pages, then the appellant may bind

it separately from the other parts of the brief without filing a motion seeking permission from the appellate court to do so. (iii) To assist in the abstracting process, the court reporter shall provide the appellant at a nominal charge an electronic copy of the transcript. (iv) The Clerk will refuse to accept a brief if the abstract does not comply with this rule. The Clerk shall handle briefs with a noncompliant abstract pursuant to Rule 4-1(e) by marking the brief tendered and granting a seven-day compliance extension. As prescribed by Rule 4-1(d), the abstract must also comply with Administrative Order 19's redaction requirements for confidential information.

(6) *Statement of the Case.* The appellant's brief shall contain a concise statement of the case without argument. This statement, denoted as the "Statement of the Case," shall ordinarily not exceed two pages in length, and shall not exceed five pages without leave of the court. The pages of the statement of the case shall appear immediately before the argument and are not counted against the page limits of the argument set out in Rules 4-1(b) and 4-3(e). The statement of the case should be sufficient to enable the court to understand the nature of the case, the general fact situation, and the action taken by the trial court. The statement must include supporting page references to the abstract or addendum or both. The Clerk will refuse to accept a brief if the required references to the abstract or addendum are not included. The appellee's brief need not contain a statement of the case unless the appellant's statement is deemed to be controverted or insufficient.

(7) *Argument.* Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue. Citations of decisions of the Arkansas Supreme Court and Court of Appeals must be from the official reports, and all citations to both official and unofficial reports shall follow the format prescribed in Rule 5-2. All citations of decisions of any other court must state the style of the case and cite the official reporter (including a regional reporter so designated by the issuing court) in which the case is found. If the case is also reported by unofficial publishers, including an unofficial electronic database, one of these should also be cited. Reference in the argument portion of the parties' briefs to material found in the abstract and addendum shall be followed by a reference to the page number of the abstract or addendum at which such material may be found. The number of pages for argument shall comply with Rule 4-1(b).

(8) *Addendum.* The appellant's brief shall contain an addendum after the signature and certificate of service. The addendum shall contain true and legible copies of the non-transcript documents in the record on appeal that are essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. The addendum shall not merely reproduce the entire record of trial court filings, nor shall it contain any document or material that is not in the record.

(A) *Contents.*

(i) The addendum must include the following documents:

- the pleadings (as defined by Rule of Civil Procedure 7(a)) on which the circuit court decided each issue: complaint, answer, counterclaim, reply to counterclaim, cross-claim, answer to cross-claim, third-party com-

plaint, and answer to third-party complaint. If any pleading was amended, the final version and any earlier version incorporated therein shall be included;

- all motions (including posttrial and postjudgment motions), responses, replies, exhibits, and related briefs, concerning the order, judgment, or ruling challenged on appeal. But if a transcript (stenographically reported material) of a hearing, deposition, or testimony is an exhibit to a motion or related paper, then the material parts of the transcript shall be abstracted, not included in the addendum. The addendum shall also contain a reference to the abstract pages where the transcript exhibit appears as abstracted;

- any document essential to an understanding of the case and the issues on appeal, such as a will, contract, lease, note, insurance policy, trust, or other writing;

- in a case where there was a jury trial, the jury's verdict forms;

- defendant's written waiver of right to trial by a jury;

- in a case where there was a bench trial, the court's findings of fact and conclusions of law, if any;

- the order, judgment, decree, ruling, letter opinion, or administrative agency decision from which the appeal is taken. In workers' compensation appeals, the administrative law judge's opinion shall be included when it is adopted in the order of the full commission. If the order (however named) incorporates a bench ruling, then that ruling must be abstracted and the addendum must contain a reference to the abstract pages where the information appears as abstracted. The transcript (stenographically reported material) containing the ruling may also be copied in the addendum or omitted, at the appellant's choice;

- all versions of the order (however named) being challenged on appeal if the court amended the order;

- any order adjudicating any claim against any party with or without prejudice;

- any Rule of Civil Procedure 54(b) certificate making an otherwise interlocutory order a final judgment;

- all notices of appeal;

- any postjudgment motion that may have tolled the time for appeal, and is therefore necessary to decide whether a notice of appeal was timely filed;

- any motion to extend the time to file the record on appeal, and any related response, reply, or exhibit;

- any order extending the time to file the record on appeal; and

- any other pleading or document in the record that is essential for the appellate court to confirm its jurisdiction, to understand the case, and to decide the issues on appeal. For example, docket sheets, superseded pleadings, discovery related documents, proffers of documentary evidence, jury instructions given or proffered, and exhibits (such as maps, plats, photographs, computer disks, CDs, DVDs).

(ii) *Waiver of addendum obligation.* If an exhibit or other item in the record cannot be reproduced in the addendum, then the party making the addendum must file a motion seeking a waiver of the addendum obligation.

(B) *Form.* Each page in the addendum must also show the record page number where the original is located. Each document must be a complete and legible copy of the original, clearly showing any file mark. If an

addendum exceeds two hundred fifty pages, then a party may bind it separately from the rest of the brief without filing a motion seeking permission from the appellate court to do so.

(C) *Supplemental addendum.* An appellee may include a supplemental addendum containing any document in the record on which the appellee relies in its brief and that is absent from the appellant's addendum. A cross-appellant shall likewise limit any supplemental addendum to documents of record not contained in the appellant's addendum but necessary to demonstrate appellate jurisdiction over, and to decide the issues in, the cross-appeal. A cross-appellee may include a non-duplicative supplemental addendum limited to documents concerning the cross-appeal.

(D) *Miscellaneous.* If the Clerk determines that the addendum does not comply with this rule, he or she shall refuse to accept a brief. The Clerk shall handle briefs with a noncompliant addendum pursuant to Rule 4-1(e) by marking the brief tendered and granting a seven-day compliance extension. As prescribed by Rule 4-1(d), the addendum must also comply with Administrative Order 19's redaction requirements for confidential information.

(9) *Cover for briefs.* On the cover of every brief there should appear the number and style of the case in the Supreme Court or Court of Appeals, a designation of the court from which the appeal is taken, and the name of its presiding judge, the title of the brief (e.g., "Abstract, Addendum, and Brief for Appellant"), and the name or names of individual counsel who prepared the brief, including their bar numbers, addresses, telephone and facsimile numbers, and e-mail addresses.

(b) *Insufficiency of appellant's abstract or addendum.* Motions to dismiss the appeal for insufficiency of the appellant's abstract or addendum will not be recognized. Deficiencies in the appellant's abstract or addendum will ordinarily come to the court's attention and be handled in one of four ways as follows:

(1) If the appellee considers the appellant's abstract or addendum to be defective, the appellee's brief should call the deficiencies to the court's attention and may, at the appellee's option, contain a supplemental abstract or addendum. When the case is considered on its merits, the court may upon motion impose or withhold costs, including attorney's fees, to compensate either party for the other party's noncompliance with this rule. In seeking an award of costs under this paragraph, counsel must submit a statement showing the cost of the supplemental abstract or addendum and a certificate of counsel showing the amount of time that was devoted to the preparation of the supplemental abstract or addendum.

(2) If the case has not yet been submitted to the court for decision, an appellant may file a motion to supplement the abstract or addendum and file a substituted brief. Subject to the court's discretion, the court will routinely grant such a motion and give the appellant fifteen days within which to file the substituted abstract, addendum, and brief. If the appellee has already filed its brief, upon the filing of appellant's substituted abstract, addendum, and brief, the appellee will be afforded an opportunity to revise or supplement its brief, at the expense of the appellant or the appellant's counsel, as the court may, upon motion, direct.

(3) Whether or not the appellee has called attention to deficiencies in the appellant's abstract or addendum, the court may address the question at any time. If the court finds the abstract or addendum to be deficient such that the court cannot reach the merits of the case, or such as to cause an

unreasonable or unjust delay in the disposition of the appeal, the court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, addendum, and brief, at his or her own expense, to conform to Rule 4-2 (a)(5) and (8). Mere modifications of the original brief by the appellant, as by interlineation, will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement the brief, at the expense of the appellant or the appellant's counsel, as the court may direct. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, addendum and brief within the prescribed time, the judgment or decree may be affirmed for noncompliance with the rule.

(4) If the appellate court determines that deficiencies or omissions in the abstract or addendum need to be corrected, but complete rebriefing is not needed, then the court will order the appellant to file a supplemental abstract or addendum within seven calendar days to provide the additional materials from the record to the members of the appellate court.

(c) *Noncompliance.* (1) Briefs not in compliance with the format required in Rules 4-1 and 4-2 shall not be accepted for filing by the Clerk. When a party submits a noncompliant brief on time that substantially complies with the rules governing briefs, the Clerk shall mark the brief "tendered," grant the party a seven-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within seven (7) calendar days, then the Clerk shall accept that brief for filing on the date it is received.

(2) If after a brief has been accepted for filing, it is determined that an appellee's brief is deficient or an appellant's brief is deficient in areas not addressed in Rule 4-2(b)(3), the court may give the party fifteen days to cure the noncompliance under the procedure described in Rule 4-2 (b)(3). If the problem is not timely corrected, then the court will take appropriate action, including affirming the judgment or decree at cost to the appellant, or otherwise giving judgment according to the requirements of the case.

(3) After the opportunity to cure deficiencies has been afforded pursuant to Rule 4-2(b)(3) or (c)(2), attorneys who fail to comply with the requirements of this rule may be referred to the Office of Professional Conduct, and in addition, may be subject to any of the following: (A) contempt, (B) suspension of the privilege to practice before the Supreme Court or Court of Appeals for a specified time or until the attorney can demonstrate a satisfactory competency of the rules, or (C) imposition of any of the sanctions listed in Rule 11(c) of the Rules of Appellate Procedure-Civil. (Amended July 15, 1996, effective for all cases in which the record is lodged on or after September 1, 1996; amended June 30, 1997, effective for cases in which the record is lodged on or after September 1, 1997; amended January 29, 1998, effective for briefs filed after July 1, 1998; amended May 31, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended June 7, 2001, effective July 1, 2001; amended September 20, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended January 24, 2002; amended May 8, 2003; amended May 29, 2003; amended September 23, 2004; amended February 10, 2005; amended October 29, 2009, effective January 1, 2010; amended March 31, 2011.)

Publisher's Notes. The Arkansas Supreme Court issued the following *Per Curiam* on February 13, 1978: "PER CURIAM. In recent years a practice has grown up by which counsel attach to their abstracts and briefs typewritten, photographed, or Xeroxed copies of *written* exhibits, such as deeds, insurance policies, and similar instruments or documents. This practice is contrary both to Rules 8 and 11 [now Rules 4-1 and 4-3], which require that abstracts and briefs be *printed*, and to Rule 9 (d), as amended on February 9, 1976 [now Rule 4-2(6)], which provides for the attachment of only those exhibits 'which cannot be abstracted in words.' Counsel's failure to abstract such exhibits frequently makes it impossible for the members of the court to properly consider the exhibits as reproduced. Effective April 1, 1978, the clerk will not accept abstracts and briefs not complying in this respect with the court's rules."

By *Per Curiam* dated July 15, 1996, the Supreme Court provided, in part, that effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 1996, and as more fully explained in the amended rules which follow [Sup. Ct. & Ct. App. Rules 1-2, 2-4, 4-2], it will

be necessary for the appellant, at the time the appellant's brief is filed, to complete and file a "Cover Sheet and Jurisdictional Statement." The chief aim of these papers is to identify cases of legal significance and importance, irrespective of the category of the law, which should be decided in the Supreme Court. Each court shall review the information contained in the Cover Sheet and Jurisdictional Statement as a threshold matter to assess whether the appeal is filed in the proper court, and, if not, to promptly transfer or certify the case.

The Supreme Court wished to emphasize that as of the January 24, 2002 amendment to this Rule, the Argument portion of a brief now requires that for each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue.

Court's Notes re Addendum: The Court is cognizant that the requirement of the Addendum is a significant addition to the brief, and there will be a period of adjustment. Thus, for a reasonable period, the Clerk of the Court should be liberal in granting extensions pursuant to Rules 4-3(k) and 4-4(c) to enable a party to remedy a problem with an Addendum.

RESEARCH REFERENCES

Ark. L. Notes. Watkins, Procedural Notes from All Over, 1989 Ark. L. Notes 65.

Watkins, Abstracting the Record on Appeal: The Dragon Lives, 2001 Ark. L. Notes 85.

Ark. L. Rev. Arkansas Appellate Practice: Abstracting the Record, 31 Ark. L. Rev. 359.

Notes, Richardson v. State: Ark. R. Crim. P. 8.1 — A Rule in Need of a Standard, 38 Ark. L. Rev. 842.

Recent Developments, Alleviating Congesting in Arkansas Appellate Courts: Recent Changes in the Appellate Process, 51 Ark. L. Rev. 453.

Watkins & Marshall, A Modest Proposal: Simplify Arkansas Appellate Practice by Abolishing the Abstracting Requirement, 53 Ark. L. Rev. 37.

CASE NOTES

ANALYSIS

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Constitutionality.

The court rejected the argument that the abstracting requirements of this rule are an unfair imposition upon poor litigants and are unnecessary for the resolution of substantive issues. *Allen v. Routon*, 57 Ark. App. 137, 943 S.W.2d 605 (1997).

In General.

While there is no penalty for infraction of this rule, appellate advocates are expected to familiarize themselves with the rules and observe them. *Davis v. Johnston*, 251 Ark. 1078, 479 S.W.2d 525 (1972) (decision under prior rule).

This rule does not require or permit the substitution of the entire record as an abstract. *Collins v. Duncan*, 257 Ark. 722, 520 S.W.2d 192 (1975) (decision under prior rule).

When petition for habeas corpus is accompanied by a single copy of the record of the proceedings in the trial court, that record should be abstracted in accordance with this rule. *Lincoln v. State*, 262 Ark. 511, 558 S.W.2d 146 (1977) (decision under prior rule).

In a brief to the Supreme Court the abstract should be done in first person and is not to be copied verbatim from the transcript. *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982).

Former subsection (d) (now subdivision (a)(6)) of this rule requires that the appellant furnish the appellate court an abstract of the record containing a condensation of those material parts of the record which are necessary to an understanding by the court of all questions presented for decision. *Johnson v. State*, 17 Ark. App. 125, 704 S.W.2d 647 (1986) (decision under prior rule).

All relevant orders entered by the trial judge are to be abstracted. *City of Marianna v. Arkansas Mun. League*, 291 Ark. 74, 722 S.W.2d 578 (1987); *Davis v. Wingfield*, 297 Ark. 57, 759 S.W.2d 219 (1988) (decision under prior rule).

Appeal affirmed based on the insufficiency of the appellants' abstract under subdivision (b)(2) of this rule. *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994), overruled in part, 2009 Ark. 332, — S.W.3d —, 2009 Ark. LEXIS 366 (2009).

Review on appeal is limited to the record as abstracted, and the court will not reach the merits of a case when the documents in the transcript that are necessary for an under-

standing of the case are not abstracted. *Burns v. Carroll*, 318 Ark. 302, 885 S.W.2d 16 (1994).

Subdivision (b)(2) of this rule provides that a judgment may be affirmed for noncompliance with subdivision (a)(6) of this rule. *Jones v. McCool*, 318 Ark. 688, 886 S.W.2d 633 (1994), criticized *Daffron v. State*, 325 Ark. 411, 926 S.W.2d 662 (1996).

There are seven judges on the Supreme Court, and it is impossible for each of the seven to examine a single transcript. *Winters v. Elders*, 324 Ark. 246, 920 S.W.2d 833 (1996).

Excessive abstracting is as violative of this rule as omissions of material matters. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996).

In a homeowner's appeal from judgment in a negligence action against a gas company, the inclusion in her addendum and abstract of materials regarding her medical records and the deposition of an expert witness who did not testify at trial was improper because, under subsection (a) of this rule, they were irrelevant to the points on appeal, namely, issues regarding the admission or exclusion of certain unrelated evidence and the propriety of a jury instruction on the last clear chance doctrine; hence, the court ordered the homeowner to remove the irrelevant materials from addendum and abstract and to resubmit the brief, addendum, and abstract within 15 days of its order. *Miller v. Hometown Propane Gas, Inc.*, 82 Ark. App. 82, 110 S.W.3d 304 (2003).

On appeal from his conviction for capital murder, where defendant's brief was almost completely deficient, supplementation of the record and rebriefing was ordered. *Holloway v. State*, 361 Ark. 238, 205 S.W.3d 797 (2005).

First sentence of this rule mandates the inclusion of any documents that are essential to an understanding of the court's jurisdiction on appeal, and it is essential to the appellate court's determination of jurisdiction that it have before it the notice of appeal, yet the same rule indicates that the notice of appeal "may" be included, and it is not included in the list of documents for which the clerk can refuse to accept a brief if they are absent from the addendum; however, the fact remains that a copy of the notice of appeal, along with the order appealed from, must be included in the addendum. *Second Injury Fund v. Sedgwick James of Ark.*, 90 Ark. App. 463, 206 S.W.3d 894 (2005).

Court noted that doctrinal labels were not controlling, but the substance of the argument made was, and all parties having fully briefed the dispositive issue, the court can and did decide it. *Miller v. Cothran*, 102 Ark. App. 61, 280 S.W.3d 580 (2008).

Purpose.

The purpose of former subdivisions (c) and (f) (now subdivisions (a)(4), (5) and (7)) of this rule is to aid the court in following the arguments and to enable it to determine whether there is merit in any alleged point of error. *Randle v. State*, 257 Ark. 232, 516 S.W.2d 6 (1974) (decision under prior rule).

The purpose of the statement of the case is to give the court an unbiased, impartial, and factual overview and synopsis of the nature of the case and the proceedings below; it is not the place for argument. *First State Bldg. & Loan Ass'n v. Arkansas Sav. & Loan Ass'n Bd.*, 261 Ark. 482, 549 S.W.2d 274 (1977) (decision under prior rule).

The reason for the rule requiring an abstract or abridgment of the record is that there is only one record and there are seven judges; it is impractical, and often times impossible, for all seven judges to attempt to pass around the one record, and they will not do so. *Davis v. Peebles*, 313 Ark. 654, 857 S.W.2d 825 (1993); *Jewell v. Arkansas State Bd. of Dental Exmrs.*, 324 Ark. 463, 921 S.W.2d 950 (1996).

It is incumbent upon the appellant to abstract the material parts of the record for review, and the reason for this is basic: there are seven justices on the court and only one record, and when an abstract is so deficient that the justices are unable to discern what happened in the trial court, they will affirm. *Franklin v. State*, 318 Ark. 99, 884 S.W.2d 246 (1994).

Abridgment of Record.

Supreme Court could not reach the merits of case and affirmed the chancellor because appellant did not comply with this rule requiring an abridgment of the record which will sufficiently enable the court to understand all questions presented or points relied upon for reversal. *Tudor v. Tudor*, 247 Ark. 822, 448 S.W.2d 17 (1969) (decision under prior rule).

A reprint of a transcript is not an abstract; an abstract that is a mere reprint of the record, or a substantial part of it, may be such a violation of the rule as to preclude the court from reversing the judgment on its merits. *Board of Educ. v. Ozark Sch. Dist. No. 14*, 280 Ark. 15, 655 S.W.2d 368 (1983) (decision under prior rule).

An abstract cannot be said to be a condensation or abridgment of the record as required if it consists of a copy in full or is a mere reproduction of the entire transcript. *Oaklawn Jockey Club, Inc. v. Jameson*, 280 Ark. 150, 655 S.W.2d 417 (1983) (decision under prior rule).

It is the duty of the appellant to furnish the Supreme Court with an abridgment of the record sufficient to understand the matters

presented. *Peterson Indus., Inc. v. Farmer*, 288 Ark. 298, 705 S.W.2d 8 (1986) (decision under prior rule).

Abstract was not excessive where it was a mere fifteen pages long, did not prevented the court from reaching the merits of the case or cause a delay in the disposition of the appeal, and where a removal of all irrelevant or immaterial portions would not result in a substantial change in the length of the abstract because nearly all portions were material and necessary to the court's understanding of the issues. *Talbert v. U.S. Bank, N.A.*, 372 Ark. 148, 271 S.W.3d 486 (2008).

Abstract Required.

On appeal of the grant of summary judgment in an action filed under the Arkansas Freedom of Information Act, §§ 25-19-101 — 109, appellant contended that abstracting the summary judgment hearing was not necessary because his cause of action was premised upon constitutional violations. The Supreme Court of Arkansas held that appellant failed to show that he should be relieved from the abstracting requirement under subdivision (a)(5) of this rule; any deficiencies in the abstract would be addressed by the court at the appropriate time. *Loveless v. Tucker*, 2009 Ark. 424, — S.W.3d —, 2009 Ark. LEXIS 542 (2009).

Defendant's conviction for third-offense driving while intoxicated was proper because, despite the appellate court's having previously remanded the case to defendant with a suggestion that he include a copy of the video in his addendum, he declined to do so; instead, the appellate court only received a transcript that obviously did not show the quality of his driving or his speech. The record on appeal was limited to what was included in the briefs and the abstract, and the burden was clearly placed on defendant to provide an abstract and addendum sufficient for appellate review; furthermore, subdivision (b)(3) of this rule authorized the appellate court to affirm if a defendant failed to correct an omission in his or her abstract or addendum. *Heathman v. State*, 2009 Ark. App. 601, — S.W.3d —, 2009 Ark. App. LEXIS 1062 (Sept. 23, 2009).

After appellant distributor had presented the Arkansas Supreme Court with a transcript and abstract of the circuit court's hearing, which were essential to the understanding of the questions presented on appeal, pursuant to subdivision (a)(5) of this rule, the court could proceed with the merits of the appeal. *Landmark Novelties, Inc. v. Ark. State Bd. of Pharm.*, 2010 Ark. 40, 358 S.W.3d 890 (2010).

Addendum.

Where appellant seeking review of the dismissal of claims against a motorcycle owner

included only the order of dismissal in the addendum, the addendum did not comply with subdivision (a)(8) of this rule and the deficiency prevented a review on the merits unless appellant timely filed a substituted and rule-compliant addendum. *Branscumb v. Freeman*, 357 Ark. 644, 187 S.W.3d 846 (2004).

Court could not reach the merits of insurance company's appeal because of the company's failure to comply with the court's addendum requirements pursuant to Ark. Sup. Ct. & Ct. App. R. 4-1 and this rule; the company failed to include, among other necessary and missing pleadings, the company's motion and brief for partial summary judgment, the insured's response to the motion, and the company's reply to the insured's response. *Unum Life Ins. Co. of Am. v. Edwards*, 361 Ark. 150, 205 S.W.3d 126 (2005).

Where the addendum filed in defendant's appellate brief did not contain a timely notice of appeal, the brief was insufficient under subdivision (a)(8) of this rule and rebriefing was ordered. *Tillman v. State*, 363 Ark. 309, 213 S.W.3d 626 (2005).

When a pro se petitioner, who sought relief under 42 U.S.C.S. § 1983, failed to provide, in his addendum, copies of the order from which he appealed, the petitioner was ordered to rebrief to comply with subdivision (a)(8) of this rule. *Kennedy v. Byers*, 368 Ark. 516, 247 S.W.3d 525 (2007).

Wife was ordered to file a substituted addendum to conform to subdivision (a)(8) (2006) of this rule where she failed to include the relevant contempt petitions against her former husband in the addendum and without the petitions, it was impossible to decide the case on the merits or determine whether her arguments were preserved. *Conlee v. Conlee*, 369 Ark. 178, 251 S.W.3d 306 (2007).

Where a former ward asserted a fiduciary misconduct claim against a bank and appealed from the decision approving the bank's final accounting, remand was warranted because the record was incomplete; because of the ward's omission in the record, the ward failed to include "relevant pleadings" in violation of subdivision (a)(8) of this rule and was ordered to supplement the addendum. *Heard v. Regions Bank*, 369 Ark. 274, 253 S.W.3d 422 (2007).

Father's appeal from the termination of his parental rights and from the granting to the Department of Health and Human Services the power to consent to adoption was improper because the father's brief did not comply with Ark. Sup. Ct. & Ct. App. R. 6-9 in that the father's addendum failed to include any of the previous orders considered by the circuit court in its decision to terminate the father's parental rights. Thus, the father was provided with 15 days from the date of the

supreme court's opinion in which to file a substituted brief, abstract, and addendum to cure the deficiencies, at his own expense, subdivision (b)(3) of this rule. *Posey v. Ark. HHS*, 370 Ark. 1, 256 S.W.3d 504 (2007).

Although appellant police officer's addendum did not violate the rules, it was organized thematically by issue, rather than chronologically, which made it appear that the officer was trying to persuade the court by organizing the documents to his advantage; arranging the documentary part of the record chronologically was the best practice. *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007).

On appeal of the order denying attorneys' fees in an action for breach of contract, appellant failed to include photocopies of the complete purchase agreement and employment agreement in its addendum; because the appellate brief did not comply with subsection (a) of this rule, the Supreme Court of Arkansas could not consider the appeal. A rebriefing was ordered, and appellant was permitted to use pertinent portions of the record from the first appeal in order to bring its addendum in compliance with subdivision (a)(8) of this rule. *Asbury Auto. Used Car Ctr. v. Brosh*, 375 Ark. 121, 289 S.W.3d 88 (2008).

Neither the addendum nor the record included documentary proof of the date when the complaint and first request for admissions were served, and such proof of service was essential to an understanding of the purported landowner's first point on appeal. *Chiodini v. Lock*, 2009 Ark. 343, 322 S.W.3d 9 (2009).

In a class action, because insurance companies' brief was not in compliance with subdivisions (a)(5) and (6) of this rule as they failed to include the proper documents in their addendum, the court was unable to consider their motion for a writ of prohibition. *Foremost Ins. Co. v. Miller County Circuit Court*, 2009 Ark. 636, — S.W.3d —, 2009 Ark. LEXIS 827 (2009).

Rebriefing was required because the parties' addenda did not comply with subdivision (a)(8) of this rule; a judgment, pleadings, and documents necessary to deciding the appeals had been omitted. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2009 Ark. App. 878, — S.W.3d —, 2009 Ark. App. LEXIS 1032 (2009).

In a divorce case where an appeal was dismissed, there were deficiencies in an abstract and an addendum that had to be corrected if the appeal was refiled. Many of the documents did not contain required file marks, the addendum had to contain omitted pleadings and exhibits, and the exhibits in the addendum should have been replicas of the exhibits contained in the record, rather than photocopies from another source. *Spears*

v. Spears, 2012 Ark. App. 181, — S.W.3d —, 2012 Ark. App. LEXIS 288 (Feb. 29, 2012).

Court ordered the trial court to settle the record and ordered defendant to file a substituted abstract and brief, for purposes of Ark. R. App. P.—Civ. 6(e), Ark. R. App. P.—Crim. 4, and subdivision (a)(8) of this rule; the record and brief, submitted in this appeal, allowed the court to address the case's merits. *Reyes v. State*, 2012 Ark. App. 358, — S.W.3d —, 2012 Ark. App. LEXIS 474 (May 23, 2012).

Appointment of Counsel.

Counsel will be appointed upon proper motion for the pro se appellant in a criminal case who is unable to produce an acceptable pro se brief. *Roberts v. State*, 288 Ark. 640, 707 S.W.2d 324 (1986) (decision under prior rule).

Audiotapes.

Requirement to abstract audiotape, alleged to be of poor quality, would not be waived, but what could be abstracted of the tape should be, assuming tape was played to jury and statement was a point on appeal. *Hodge v. State*, 329 Ark. 57, 945 S.W.2d 384 (1997).

Briefs.

When it does not cause an unreasonable or unjust delay in the disposition of an appeal, an appellant's attorney may be allowed time to reprint his brief, at his own expense, to conform to this rule. *Young v. State*, 308 Ark. 372, 823 S.W.2d 911 (1992) (decision under prior rule).

Appellate court deferred action on the appeal until appellant complied with this rule; appellant had to submit a substituted brief that contained a revised abstract that included an abstract of the hearing granting appellees' motions for summary judgment as well as all material parts of the colloquies between the court and counsel necessary to an understanding of all questions presented to the court for decision. *Moon v. Holloway*, 353 Ark. 520, 110 S.W.3d 250 (2003).

Where defendant's addendum lacked the judgment and commitment order that were at issue on appeal, the notice of appeal, and copies of prior convictions that defendant argued were improperly used to enhance the sentence, pursuant to subdivision (b)(3) of this rule, defendant was ordered to submit a substituted addendum that included such documentation or else risk affirmance of the conviction based on noncompliance with the rule. *Dodson v. State*, 357 Ark. 646, 187 S.W.3d 854 (2004).

In a petition for review, while the Arkansas Supreme Court did grant the parties permission to file supplemental and reply briefs and granted the mother permission to file a substituted brief in order to cure deficiencies in her abstract and addendum, that did not give the mother permission to raise points on appeal that were not originally submitted to

the court of appeals for review; thus, the Court declined to consider any point on appeal that was not originally submitted to the court of appeals. *Rodriguez v. Ark. Dep't of Human Servs.*, 360 Ark. 180, 200 S.W.3d 431 (2004).

Pursuant to its authority under subdivision (b)(3) (2006) of this rule to reach sua sponte issues of deficiencies in briefs, the court did not reach the merits of an appeal because of appellant's failure to comply with Ark. Sup. Ct. & Ct. App. R. 4-1 (2006); appellant's brief was not double-spaced as required by Rule 4-1, thus resulting in a brief that exceeded 25 pages of text. The court ordered rebriefing by appellant. *Nash v. Ark. Elevator Safety Bd.*, 370 Ark. 86, 257 S.W.3d 80 (2007).

Appellate court was unable to consider an appeal brought by an administratrix and bankruptcy estate trustee where their brief did not include all of their complaints or summary judgment pleadings and thus, it was not in compliance with subsection (b) of this rule. *Preston v. Stoops*, 373 Ark. 115, 281 S.W.3d 720 (2008).

Husband was ordered to file a substituted brief in his appeal to the supreme court in which he challenged the circuit court's jurisdiction to enter the divorce decree as he failed to abstract his wife's testimony pursuant to this rule regarding the residency requirements of §§ 9-12-307(a)(1)(A) and 9-12-306(c)(1). *Roberts v. Roberts*, 2009 Ark. 306, 319 S.W.3d 234 (2009).

On appeal of defendant's conviction for three counts of battery in the second degree and one count of battery in the first degree, defendant's appellate brief did not comply with subdivision (a)(8) of this rule as it did not contain the amended information designating the charges against him. Because defendant failed to preserve his challenge to the sufficiency of the evidence for appellate review, the deficiency was not such that the appellate court could not reach the merits of the case. *Davis v. State*, 2009 Ark. App. 573, — S.W.3d —, 2009 Ark. App. LEXIS 743 (2009).

When a case was returned for rebriefing, the parties were required to include addendum references in the argument portions of their briefs for any pleadings, orders, documents, or exhibits that they addressed in their arguments, pursuant to subdivision (a)(7) of this rule. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2009 Ark. App. 878, — S.W.3d —, 2009 Ark. App. LEXIS 1032 (2009).

Contents of Abstract.

As it is a practical impossibility for the seven justices of the Arkansas Supreme Court to examine a single transcript filed with that court, it is absolutely essential that an appellant produce an abstract containing only the information necessary for them to decide his

or her appeal. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993) (decision under prior rule).

An appellant's abstract or abridgment of the record should consist of an impartial condensation of the material parts of the pleadings, proceedings, facts, documents, and other matters in the record as are necessary to an understanding of all questions presented to the court for decision. *Davis v. Peebles*, 313 Ark. 654, 857 S.W.2d 825 (1993).

In order to preserve a sufficiency of the evidence argument for an appellate court's consideration, a motion for directed verdict must have been made at the close of the plaintiffs' case-in-chief, and again at the conclusion of all the evidence under ARCP 50(a) and (e); under this rule, the appellate brief must contain an abstract of the motions for directed verdict and a recitation of the grounds for such relief. *Stroud Crop, Inc. v. Hagler*, 317 Ark. 139, 875 S.W.2d 851 (1994), overruled in part, 2009 Ark. 332, — S.W.3d —, 2009 ARK. LEXIS 366 (2009).

Defendant's abstract failed to comply with subdivision (a)(6) of this rule where there were no references whatsoever to pages in the abstract and only transcript citations were supplied. *Sanders v. State*, 317 Ark. 328, 878 S.W.2d 391 (1994), cert. denied 513 U.S. 1162, 115 S. Ct. 1126, 130 L. Ed. 2d 1088 (1995).

An abstract is to be a condensation of the material parts of the pleadings, proceedings, and other matters contained in the record so that it will give the appellate court an understanding of the points of appeal. *McAdams v. Automotive Rentals, Inc.*, 319 Ark. 254, 891 S.W.2d 52 (1995), cert. denied 516 U.S. 844, 116 S. Ct. 132, 133 L. Ed. 2d 80 (1995).

Excessive abstracting is as violative of the rules as omissions of material pleadings, exhibits, and testimony; scores of single-spaced pages of pleadings and transcripts copied verbatim from the record, rather than condensed in compliance with subdivision (a)(6) of this rule, are strongly discouraged. *St. Paul Fire & Marine Ins. Co. v. Brady*, 319 Ark. 301, 891 S.W.2d 351 (1995).

It is essential that the photographs at issue on an appeal be available in the abstract for examination; it is a practical impossibility for seven justices to examine the single transcript filed with the appellate court, and they will not do so. *J.B. Hunt Transp., Inc. v. Doss*, 320 Ark. 660, 899 S.W.2d 464 (1995).

Court allowed appellant to file a new brief rather than affirming the conviction where appellant did not abstract his proffered instructions but the proposed instructions were included in the transcript. *Walton v. State*, 50 Ark. App. 253, 905 S.W.2d 857 (1995).

As it is impractical to require all seven members of the Court to examine one transcript, and as the burden on appellant to

reproduce exhibits is slight, the Court will summarily affirm where the appellant fails to abstract exhibits that are essential to the determination of the appeal. *Kingsbury v. Robertson*, 325 Ark. 12, 923 S.W.2d 273 (1996).

It is a fundamental rule that arguments will not be considered where the supporting testimony or evidence has not been abstracted. *Hill v. State*, 337 Ark. 219, 988 S.W.2d 487 (1999).

The petitioner was not barred from asserting that the doctrine of res judicata applied to his probation revocation proceeding, notwithstanding that he failed to abstract the trial court's judgment following his initial guilty plea, since the judgment actually appealed from was a later judgment revoking his probation and the initial judgment was not critical to appellate review. *Hill v. State*, 341 Ark. 211, 16 S.W.3d 539 (2000).

Where the juvenile's abstract and addendum were deficient because the juvenile failed to include the video retrieved from store, such that the appellate court could not reach merits of the juvenile's appeal from his delinquency adjudication for shoplifting, the appellate court ordered the juvenile to supplement the record and rebrief the case. *Simmons v. State*, 80 Ark. App. 426, 97 S.W.3d 421 (2003).

Defendant's brief was deficient enough for the appellate court to order rebriefing; defendant was required to prepare an abstract that provided the appellate court with a better understanding of the questions presented on appeal, and the brief filed by defendant's counsel was deficient in that it did not adequately and zealously present the issues and cited the appellate court to persuasive authority. *Spears v. State*, 82 Ark. App. 376, 109 S.W.3d 139 (2003).

Subdivision (a)(5) of this rule merely provides, in part, that an appellant should abstract only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the court for decision; subdivision (a)(5) of this rule does not purport to deal in any way with the question of what portions of the trial court record an appellant is required to designate as the appeal record. *Cobbs v. Ark. Dep't of Human Servs.*, 87 Ark. App. 188, 189 S.W.3d 487 (2004).

On review of a termination hearing, the court denied a motion filed by the Arkansas Department of Human Services (ADHS) to order appellant mother to abstract portions of the record that she did not include in her brief as it was not the function of the appellate court to dictate to an appellant what parts of the record she must designate as her record and the ADHS was free to designate addi-

tional parts of the record. *Rawles v. Ark. Dep't of Human Servs.*, 89 Ark. App. 331, 202 S.W.3d 547 (2005).

An abstract should be a condensed version of the transcript, not a verbatim copy. *Chiodini v. Lock*, 2009 Ark. 343, 322 S.W.3d 9 (2009).

From an inmate's tort and civil rights suit against the county and a judge, the appellate court could not reach the merits of the judge's arguments as he failed to comply with subdivision (a)(5) of this rule by failing to abstract material parts of the transcripts of the depositions given by the jail administrator and the sheriff. *Gentry v. Robinson*, 2009 Ark. 345, 322 S.W.3d 498 (2009).

Costs.

Where the appellee does not file a certificate, as required by former subsection (e) (now subsection (b)) of this rule, his prayer for additional costs will be denied. *Kollmeyer v. Greer*, 267 Ark. 632, 593 S.W.2d 29 (1980); *Breeden Dodge, Inc. v. Acme Indus. Laundry, Inc.*, 269 Ark. 837, 601 S.W.2d 239 (1980); *Arkota Indus., Inc. v. Naekel*, 274 Ark. 173, 623 S.W.2d 194 (1981); *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987); *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988) (preceding decisions under prior law).

Former subdivision (e)(1) (now subdivision (b)(1)) of this rule was intended merely to provide reimbursement to an appellee when there has been a clear-cut and demonstrable failure by the appellant to abstract matters essential to a full consideration of the issues raised by the direct appeal. *Arkota Indus., Inc. v. Naekel*, 274 Ark. 173, 623 S.W.2d 194 (1981); *Rhodes v. State*, 276 Ark. 203, 634 S.W.2d 107 (1982); *Sterling Drug, Inc. v. Oxford*, 294 Ark. 239, 743 S.W.2d 380 (1988) (preceding decisions under prior rule).

Costs and fees for preparation of supplemental abstract allowed. *Vandiver v. Washington County*, 274 Ark. 561, 628 S.W.2d 1 (1982), questioned *Cox v. Commissioners of Maynard Fire Improv. Dist. No. 1*, 287 Ark. 173, 697 S.W.2d 104 (1985), criticized *North Little Rock v. Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983); *Bunker v. Bunker*, 17 Ark. App. 7, 701 S.W.2d 709 (1986); *King v. King*, 292 Ark. 336, 730 S.W.2d 224 (1987) (preceding decisions under prior rule).

Motion to tax costs against appellants pursuant to former subsection (e) (now subsection (b)) of this rule will be denied where appellants make good faith effort to give an adequate, if concise, abridgment of the record. *Dupree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983) (decision under prior rule).

Costs are only awarded to correct a deficiency in the appellant's abstract, not to supply proof for the appellee's own claims. Na-

tional Lumber Co. v. Advance Dev. Corp., 293 Ark. 1, 732 S.W.2d 840 (1987) (decision under prior rule).

Where supplemental abstract is not necessary to determination of issue on appeal, motion for costs will be denied. *Myers v. First State Bank*, 293 Ark. 82, 732 S.W.2d 459, supp. op., 741 S.W.2d 624 (1987) (decision under prior rule).

Where preparation of a supplemental abstract in an action to quiet title was not considered necessary under subsection (d) of the former rule, appellee's motion for costs occasioned by its preparation was denied. *Gilbreath v. Union Bank*, 309 Ark. 360, 830 S.W.2d 854 (1992) (decision under prior rule).

Where appellee prepared a portion of the supplemental abstract necessary to remedy deficiencies in the appellant's abstract, the appellate court reimbursed appellee for the cost. *Hartford Fire Ins. Co. v. Carolina Cas. Ins. Co.*, 52 Ark. App. 35, 914 S.W.2d 324 (1996).

Attorney's fees and costs awarded to appellee and assessed against appellant's attorney where appellant's abstract was in flagrant violation of subsection (b) of this rule. *Rosser v. Columbia Mut. Ins. Co.*, 55 Ark. App. 77, 928 S.W.2d 813 (1996).

Where the state was granted an extension of time to prepare a new abstract because of deficiencies in appellant's abstract, the court rejected the state's request for costs of the new abstract and addendum under subdivision (b)(1) of this rule because the court did not direct the state to prepare a new addendum. *Lake View Sch. Dist. No. 25 v. Huckabee*, 351 Ark. 385, 94 S.W.3d 340 (2002).

Court granted in part the teacher's motion for an award under this rule based on the additions he made in his own supplemental abstract and addendum to cure the school district's deficiencies in its original and supplemental abstract and addendum because it failed to include the certification motion upon which the circuit court's order was based, it failed to include exhibits referenced by the circuit court, and it failed to include a copy of the amended complaint. *Van Buren Sch. Dist. v. Jones*, 365 Ark. 610, 232 S.W.3d 444 (2006).

Appellate court declined to award country club members costs pursuant to Ark. Sup. Ct. & Ct. App. R. 6-7 as they would be entitled to only a paltry sum under subsection (a) of this rule, the court failed to see how the merits of the breach of contract case would warrant an award of costs under subsection (c) of this rule, and the members did not comply with this rule to recover costs under subsection (d) of this rule; however, an award of fees under § 16-22-308 was appropriate. *Millwood-RAB Mktg., Inc. v. Blackburn*, 95 Ark. App. 253, 236 S.W.3d 551 (2006).

Costs and fees were not awarded on appeal, because the reviewing court did not believe that either of the parties' abstracts and addendums were insufficient to the extent that costs should be imposed. *Arkansas Annual Conf. of the AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.*, 375 Ark. 428, 291 S.W.3d 562 (2009).

Motion seeking \$3,198.80 in costs and attorney's fees incurred for supplementing appellants' abstract and addendum, pursuant to subdivision (b)(1) of this rule, was only granted as to essential documents, appellee's summary-judgment motion and related brief. *Heflin v. Brackelsberg*, 2010 Ark. App. 261, — S.W.3d —, 2010 Ark. App. LEXIS 256 (Mar. 17, 2010).

Documents.

Although there were references to certain evidentiary documents in the abstracted testimony and in the argument portion of Appellants' briefs, as well as references to some of the documents as trial exhibits, such references did not comply with the abstracting requirements set out in subdivision (a)(6) of this rule. *National Enters., Inc. v. Rea*, 329 Ark. 332, 947 S.W.2d 378 (1997).

Mother's petition for prohibition writ regarding a grandparent's visitation order, a show-cause order, and an order finding her in contempt for failing to allow a paternal grandmother visitation with child was denied as she failed to include documents required by subdivision (a)(5) of this rule such as the orders and an abstract. *Boyd v. Circuit Court*, 367 Ark. 533, 241 S.W.3d 763 (2006).

Duty of Attorney.

Subdivision (a)(6) of this rule imposes a duty on counsel preparing the abstract not to misstate the record. *Dale v. State*, 55 Ark. App. 184, 935 S.W.2d 274 (1996).

Duty of Petitioner.

A petitioner bears the burden of producing a fair and accurate record and abstract that establish an entitlement to a writ; an ambiguous record cannot satisfy the petitioner's burden. *City of Little Rock v. Pulaski County Circuit Court*, 330 Ark. 755, 957 S.W.2d 684 (1997).

Exhibits.

When an exhibit is necessary to an understanding of the testimony about an issue, but is not included in the abstract, the issue may be summarily affirmed. *Fulkerson v. Calhoun*, 58 Ark. App. 63, 946 S.W.2d 714 (1997).

Permission should be sought for waiving the requirement, under subdivision (a)(5) of this rule, of reproducing and placing in an addendum photographs and other similar exhibits that cannot be abstracted in words by filing a motion before a brief is submitted.

Blanchard v. State, 104 Ark. App. 31, 289 S.W.3d 129 (2008), rev'd, 2009 Ark. 335, — S.W.3d — (2009).

Failure to Abstract.

Appellant's failure to abstract is noncompliance with former subsection (d) (now subdivision (a)(6)) of this rule resulting in affirmance. *Financial Sec. Life Assurance v. Powell*, 247 Ark. 609, 447 S.W.2d 64 (1969); *O'Neal v. Warmack*, 250 Ark. 685, 466 S.W.2d 913 (1971); *Fry v. Freeman*, 251 Ark. 435, 473 S.W.2d 906 (1971); *Knabe v. Ball*, 253 Ark. 351, 485 S.W.2d 745 (1972); *Mack v. Chuck*, 262 Ark. 12, 554 S.W.2d 325 (1977); *Bank of Ozark v. Isaacs*, 263 Ark. 113, 563 S.W.2d 707 (1978); *Weston v. Ponder*, 263 Ark. 370, 565 S.W.2d 31 (1978); *Wade v. Franklin Stricklin Land Surveyors, Inc.*, 264 Ark. 841, 575 S.W.2d 672 (1979), cert. denied 449 U.S. 883, 101 S. Ct. 235, 66 L. Ed. 2d 108 (1980); *Perry v. Cox*, 266 Ark. 402, 585 S.W.2d 33 (1979); *Adams v. Dopieralla*, 272 Ark. 30, 611 S.W.2d 750 (1981); *Fair v. Duncan*, 272 Ark. 114, 612 S.W.2d 123 (1981); *Bethea v. City of Little Rock*, 272 Ark. 159, 612 S.W.2d 320 (1981); *Collier v. Hot Springs Sav. & Loan Ass'n*, 272 Ark. 162, 612 S.W.2d 730 (1981); *Lawson v. Lewis*, 276 Ark. 7, 631 S.W.2d 611 (1982) (preceding decisions under prior rule).

Where nothing is abstracted, summary judgment for respondent will be affirmed for noncompliance with requirements of this rule. *Rose City Property Owners' Ass'n v. Matthews Co.*, 250 Ark. 334, 465 S.W.2d 118 (1971) (decision under prior rule); *Stephens Prod. Co. v. Johnson*, 311 Ark. 206, 842 S.W.2d 851 (1992) (decision under prior rule).

Where instead of submitting an abstract of the record as required by former subsection (d) (now subdivision (a)(6)) of this rule appellant simply prints the record, the decree will be affirmed. *Smith v. Pond*, 259 Ark. 564, 534 S.W.2d 769 (1976) (decision under prior rule).

An award of the worker's compensation commission will be affirmed where the appellant, who raises the issue as to whether the award is supported by substantial evidence on the record considered as a whole, fails to abstract the opinion or award of the commission or the decree of the circuit court approving the award. *Manes v. M.O.V.E., Inc.*, 261 Ark. 793, 552 S.W.2d 211 (1977); *Farrco Constr. Co. v. Goleman*, 267 Ark. 159, 589 S.W.2d 573 (1979) (preceding decisions under prior rule).

Where neither party presented an abstract of the opinion nor of the vast majority of the testimony presented, pursuant to this rule, review was impossible. *Smith v. Smith*, 263 Ark. 578, 567 S.W.2d 88 (1978) (decision under prior rule).

Where appellant had flagrantly violated this rule in failing to properly abstract the record, and appellees had supplied the defi-

ciency, appellees were granted attorney's fees and costs. *Roach v. Terry*, 263 Ark. 774, 567 S.W.2d 286 (1978) (decision under prior rule).

Points argued on appeal could not be decided for the want of an abstract. *Turner v. Baptist Medical Ctr.*, 275 Ark. 424, 631 S.W.2d 275 (1982) (estoppel); *Jolly v. Hartje*, 294 Ark. 16, 740 S.W.2d 143 (1987) (preceding decisions under prior rule).

Pro se litigants are held to the abstracting requirement of this rule; and while the Supreme Court is more lenient to pro se appellants, the court will not entertain an appeal which completely ignores the requirement. *Bryant v. Lockhart*, 288 Ark. 302, 705 S.W.2d 9 (1986); *Pennington v. Lockhart*, 297 Ark. 475, 763 S.W.2d 78 (1989) (preceding decisions under prior rule).

Attempt to incorporate by reference a brief presented to the lower court which is not abstracted is improper. *Jones v. Ragland*, 293 Ark. 320, 737 S.W.2d 641 (1987) (decision under prior rule).

The court was precluded from considering defendant's argument on its merits where defendant failed to abstract affidavits supporting juror misconduct referred to in her brief. *Kratzke v. Nestle-Beich, Inc.*, 307 Ark. 158, 817 S.W.2d 889 (1991) (decision under prior rule).

Failure to abstract motion in limine, trial court's ruling on the motion, objection to the testimony at trial, and trial court's ruling on the objection, was noncompliance with subsection (d) of the former rule; however, where court found from a reading of the briefs and the abstract that sufficient material parts necessary for an understanding of the objection and question at issue had been presented, it rendered a decision on the merits. *Haynes v. State*, 309 Ark. 583, 832 S.W.2d 479 (1992) (decision under prior rule).

Where brief of appellant, convicted of capital murder failed to meet the requirements of the former rule and former Rules 11(f) and 11(h), and was so inadequate that the appeal could not be decided, the state's second motion to order compliance with the rules was granted. *Jackson v. State*, 310 Ark. 379, 833 S.W.2d 376 (1992) (decision under prior rule).

Criminal conviction affirmed for failure to comply with this rule because the abstract wholly omits the hearing and ruling on the motion that is the basis of the appeal. *Dixon v. State*, 314 Ark. 378, 863 S.W.2d 282 (1993).

Appellant's argument could not be considered where abstract submitted failed to provide the documents or materials necessary to an understanding of the argument presented. *Collins v. State*, 324 Ark. 322, 920 S.W.2d 846 (1996).

While an abstract of the judgment from which the appeal comes is ordinarily required, its absence does not necessarily con-

stitute a flagrant deficiency requiring affirmance. *Williams v. State*, 328 Ark. 487, 944 S.W.2d 822 (1997).

In determining a claim of ineffective assistance of counsel in a Ark. R. Crim. P. 37.1 petition, the totality of the evidence before the factfinder must be considered and, in order for the Supreme Court of Arkansas to consider the totality of the evidence, as required by this standard, all the evidence presented both at trial and at any postconviction relief proceeding must be included in an appellant's abstract of the proceedings. *Johnson v. State*, 366 Ark. 286, 234 S.W.3d 858 (2006).

Defendant's 28 U.S.C.S. § 2254 habeas petition was properly denied because an independent and adequate state ground existed to bar federal habeas review: (1) defendant had filed an Ark. R. Crim. P. 37.1 post-conviction relief (PCR) petition challenging the legal assistance rendered by his state trial counsel; (2) the Supreme Court of Arkansas had affirmed a trial court's decision denying defendant's PCR petition because he had failed to comply with subdivision (b)(3) of this rule, which required him to include, in his appellate brief, relevant abstracts from the record necessary for adequate appellate review of his claims; and (3) the dismissal for failure to comply with the abstracting rule constituted an adequate and independent state ground for federal habeas relief purposes because the abstracting rule was firmly established and regularly enforced in Arkansas. *Clay v. Norris*, 485 F.3d 1037 (8th Cir. 2007).

Rebriefing was ordered in a state trooper's appeal of a circuit court decision denying his motion to dismiss an individual's complaint where he had included a copy of the transcript of the hearing on his motion in the addendum instead of abstracting the transcript as required by subdivision (a)(5) of this rule. *Simons v. Marshall*, 369 Ark. 184, 251 S.W.3d 303 (2007).

Where the account holder appealed the order granting the bank's motion for summary judgment in a collection matter, the account holder argued that the bank waived its claim for \$15,000 as one of her points on appeal; however, she failed to include an abstract of the issue in violation of subdivision (a)(5) of this rule. A rebriefing was ordered. *Talbert v. U.S. Bank*, 371 Ark. 429, 266 S.W.3d 741 (2007).

On appeal from a judgment of forfeiture, a rebriefing and a supplemental record were necessary because the appellant forfeiter's brief did not contain an abstract of the relevant colloquies between the trial court and counsel as required by subdivision (a)(5) of this rule and the record contained no hearing transcript. \$ 1834.00 U.S. Currency v. State, 371 Ark. 471, 267 S.W.3d 593 (2007).

Improper Abstract.

An abstract in the appellant's reply brief is improper. *Merritt v. Merritt*, 263 Ark. 432, 565 S.W.2d 603 (1978) (decision under prior rule).

Where appellant merely reproduces a major part of the transcripts, the decision will be summarily affirmed since a reprint of a transcript is not an abstract within the meaning of subdivision (d) of the former rule. *Harris v. Arkansas Real Estate Comm'n*, 274 Ark. 537, 627 S.W.2d 1 (1982) (decision under prior rule).

Inclusion of a few sentences from deposition in an appendix to the appellant's brief does not comply with former subsection (d) (now subdivision (a)(6)) of this rule; such printed or typewritten exhibits should be abstracted along with the other testimony. *Beaumont v. Robinson*, 282 Ark. 181, 668 S.W.2d 514 (1984) (decision under prior rule).

An appellant's abstract which consists of extensive-verbatim reproduction of the record clearly violates former subdivision (d) (now subdivision (a)(6)) of this rule. *Widmer v. Taylor*, 296 Ark. 337, 756 S.W.2d 903 (1988) (decision under prior rule).

Abstract which was virtually a verbatim copy of the transcript, containing almost every typewritten word of the transcript, including certificates of service on pleadings, and, in fact, containing more pages than were in the actual transcript, was flagrantly deficient. *Muldrow v. Douglass*, 316 Ark. 86, 870 S.W.2d 736 (1994).

Where the abstract of the final judgment of the court was incorrect and did not reflect the actual findings of the trial court, likewise, there was not an abstract of judgment against appellee, and there were other materials contained in the appellant's brief which were not found in the record of the hearing, the state of the abstract was as such that the court could not determine or resolve the issues presented on appeal. *Adams v. Owen*, 316 Ark. 99, 870 S.W.2d 741 (1994).

Where the transcript was 1419 pages, but appellants' abstract was four and one half pages, the notice of appeal was completely omitted from the abstract, the entire abstract, including the pleadings, was written in narrative form and contained only the barest terms, the abstract was flagrantly deficient. *Carmical v. City of Beebe*, 316 Ark. 208, 871 S.W.2d 386 (1994).

Excessive abstracting is as violative of this rule as omissions of material matters. *Schwarz v. Moody*, 55 Ark. App. 6, 928 S.W.2d 800 (1996).

Where the abstract was totally inadequate for an understanding of the issues raised on appeal, the court affirmed based on appel-

lant's failure to submit a proper abstract. *McKimmey v. Fielder*, 58 Ark. App. 317, 951 S.W.2d 566 (1997).

Appellant police officer's briefs did not comply with this rule, where the officer italicized and bolded many words and phrases in his abstract, embellishing the transcript rather than summarizing it without emphasis. *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007).

Appellant police officer's briefs did not comply with this rule because the officer should have distilled the exchanges between the circuit court and the lawyers at the many hearings, and instead, the officer's abstract of the hearings was mostly a retyped transcript of them. *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007).

Appellant police officer's briefs did not comply with this rule because the officer retained the transcript's question-answer format throughout much of his abstract of the trial. *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007).

Appellant police officer's briefs did not comply with this rule because the officer abstracted the documents admitted as exhibits at the hearings. *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007).

Appellant police officer's briefs did not comply with this rule because the officer mishandled the deposition transcripts; some of them were in the abstract, but they remained in question-answer format, and summaries of some depositions were in the addendum. *Lackey v. Mays*, 100 Ark. App. 386, 269 S.W.3d 397 (2007).

On appeal of an order granting summary judgment, appellant's brief was submitted without a proper abstract in violation of this rule; the abstract was not in the first person; and the line spacing appeared to be between single-spaced and double-spaced. A rebriefing was ordered to correct these problems. *Wilkins & Assocs. v. Vimy Ridge Mun. Water Improvement Dist. No. 139*, 372 Ark. 117, 270 S.W.3d 869 (2008).

Instructions.

Where appellant altogether fails to abstract instruction in question or any of the proceedings below that dealt with trial court's rejection of that instruction, point cannot be considered on appeal. *Williams v. Fletcher*, 267 Ark. 961, 593 S.W.2d 48 (1979); *Vail v. State*, 267 Ark. 1078, 593 S.W.2d 491 (Ct. App. 1980); *Newberry v. Johnson*, 294 Ark. 455, 743 S.W.2d 811 (1988) (preceding decisions under prior rule).

This rule does not require an appellant to abstract all the instructions given by the court as a predicate to objection on appeal to failure by the trial court to give an instruction proffered by the appellant; however, an appellant must abstract at least the instruction

proffered where the basis of appeal is failure of the trial court to have given it. The failure to abstract the proffered instruction is not cured by mention of the omitted matter in the brief of the appellee where no supplemental abstract is filed. *Williams v. Fletcher*, 267 Ark. 961, 644 S.W.2d 946 (1980); *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983); *Newberry v. Johnson*, 294 Ark. 455, 743 S.W.2d 811 (1988) (preceding decisions under prior rule).

Where appellant appealed the denial of proffered jury instructions, but failed to abstract the discussions and objections concerning the instructions, the abstract was insufficient. *Allen v. State*, 326 Ark. 541, 932 S.W.2d 764 (1996).

Supreme court could not consider the Department of Health and Human Services' request for a writ of prohibition instructing the circuit court that it was without jurisdiction to grant a wife's request for an increase in her Medicaid benefits as the Department failed to abstract the hearing as required by subdivision (b)(3) of this rule. *Ark. HHS v. Smith*, 369 Ark. 484, 255 S.W.3d 870 (2007).

Insufficient Abstract.

Appellant's appeal will be dismissed for failure to comply with this rule where his abstract is insufficient. *Jackson v. Young*, 245 Ark. 965, 435 S.W.2d 801 (1969); *Williams v. Owen*, 247 Ark. 42, 444 S.W.2d 237 (1969); *Black v. Jennings*, 247 Ark. 793, 448 S.W.2d 18 (1969); *Peek v. Helena Chem. Co.*, 247 Ark. 801, 448 S.W.2d 32 (1969); *Wells v. Paragon Printing Co.*, 249 Ark. 950, 462 S.W.2d 471 (1971); *Energy Oil Co. v. Rose Oil Co.*, 250 Ark. 484, 465 S.W.2d 690 (1971); *Reliable Fin. Co. v. Rhodes*, 252 Ark. 1077, 483 S.W.2d 187 (1972); *Rowe v. Druyvesteyn Constr. Co.*, 253 Ark. 67, 484 S.W.2d 512 (1972); *Webb v. City of Little Rock*, 253 Ark. 385, 486 S.W.2d 29 (1972); *Van Marion v. Moseley*, 259 Ark. 740, 536 S.W.2d 697 (1976); *Dyke Indus., Inc. v. E.W. Johnson Constr. Co.*, 261 Ark. 790, 551 S.W.2d 217 (1977); *Dairyland Ins. Co. v. Carter*, 261 Ark. 795, 551 S.W.2d 211 (1977); *Merritt v. Merritt*, 263 Ark. 432, 565 S.W.2d 603 (1978); *Burgess v. Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985); *Cycle Ctr., Inc. v. Allen*, 14 Ark. App. 215, 686 S.W.2d 808 (1985); *Coffelt v. Arkansas State Hwy. Comm'n*, 289 Ark. 348, 712 S.W.2d 283 (1986), cert. denied 479 U.S. 1090, 107 S. Ct. 1298, 94 L. Ed 2d 154 (1987); *Boehm v. Moench*, 19 Ark. App. 218, 718 S.W.2d 491 (1986); *Samples v. Samples*, 306 Ark. 184, 810 S.W.2d 951 (1991); *Hunter v. Williams*, 308 Ark. 276, 823 S.W.2d 894 (1992) (preceding decisions under prior rule); *Britton v. State*, 316 Ark. 219, 870 S.W.2d 762 (1994); *Jackson v. State*, 316 Ark. 509, 872 S.W.2d 400 (1994); *Porter v. Porter*, 329 Ark. 42, 945 S.W.2d 376 (1997).

The dismissal of appeal on the ground that

the abstract of record is insufficient will be denied where the appellant's abstract of record relating to the jurisdictional point is sufficient to give the court of appeal a clear understanding of the jurisdictional question on which the appeal will be decided. *Hilburn v. First State Bank*, 259 Ark. 569, 535 S.W.2d 810 (1976) (decision under prior rule).

Where the statement of the case in the brief does not comply with this rule and abstracting of testimony is interspersed with argument in such a way that the court cannot distinguish what the record shows from what is merely argument, the court will affirm the judgment rather than speculate on what facts or proceedings were before the trial court. *4-Way Tire & Battery, Inc. v. International Buyers Corp.*, 263 Ark. 561, 566 S.W.2d 143 (1978) (decision under prior rule).

Where the appellant summarizes and discusses in his brief certain parts of the record that he considers to be pertinent, such a discussion does not comply with subdivision (d) of the former rule. *Napier v. Northrum*, 264 Ark. 406, 572 S.W.2d 153 (1978) (decision under prior rule).

Where abstract is a partisan account and is in no sense an impartial condensation of the record, without comment or emphasis, it fails to meet the requirements of this rule. *Weston v. State*, 265 Ark. 58, 576 S.W.2d 705, cert. denied 444 U.S. 965, 100 S. Ct. 453, 62 L. Ed. 2d 377 (1979); *Smith v. Bullard*, 271 Ark. 794, 610 S.W.2d 888 (1981); *Williams v. Brooks*, 3 Ark. App. 130, 623 S.W.2d 216 (1981); *Mills v. Holland*, 307 Ark. 418, 820 S.W.2d 63 (1991) (preceding decisions under prior rule).

The mere scattering of transcript references in an appellant's argument is not a sufficient substitute for the requirement of a proper abstract. *Adams v. State*, 276 Ark. 18, 631 S.W.2d 828 (1982) (decision under prior rule).

On appeal, the abstract of the record constitutes the record, and the appellate court considers only that which is contained in the abstract; where the appellant's abstract does not contain the testimony on which he bases his argument, the appellate court will not explore the record for prejudicial error. *Johnson v. State*, 17 Ark. App. 125, 704 S.W.2d 647 (1986) (decision under prior rule).

Court declined to reach a decision on whether two instructions should have been used because the court had no way of knowing from the abstract what instructions were actually given. *Porchia v. State*, 306 Ark. 443, 815 S.W.2d 926 (1991); *Pearson v. State*, 307 Ark. 360, 819 S.W.2d 284 (1991) (preceding decisions under prior rule).

When an exhibit is necessary to an understanding of the testimony about an issue, but is not included in the abstract, the issue is

summarily affirmed. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993).

Where appellant's brief lacked a jurisdictional statement as required by subdivision (a)(2) of this rule, the abstract portion of appellant's brief was in large portion single-spaced in contravention of S. Ct. and Ct. App. Rule 4-1(a), deposition testimony which appeared to be quoted verbatim was neither single-spaced nor indented, the abstract contained information that was clearly unnecessary for determination of the issues presented, but was lacking information that is pertinent, and appellant failed to abstract the notice of appeal as well as the order of the trial court, the abstract was insufficient. *Trapp v. Economy Eng'g Co.*, 316 Ark. 89, 871 S.W.2d 345 (1994).

Abstract held flagrantly deficient. *Hooker v. Farm Plan Corp.*, 331 Ark. 418, 962 S.W.2d 353 (1998).

Appellant inmate was ordered to file a complying abstract, addendum and brief where his brief contained no abstract, which prevented the supreme court from reaching the merits of the case. *Nichols v. Arnold*, 347 Ark. 758, 66 S.W.3d 652 (2002).

Petitioner, Arkansas Department of Human Services (DHS), was directed to file a complying abstract and brief where the abstract it had submitted was deficient in that the hearing held on its motion to set aside the trial court's adverse order was not abstracted. *Ark. Dep't of Human Servs. v. Collier*, 351 Ark. 380, 92 S.W.3d 683 (2002).

Because of modification of the abstracting rules, where appellant's abstract and addendum were deficient such that the appellate court could not reach the merits of the case, appellant had 15 days from the date of the appellate court's opinion to file a substituted abstract, addendum, and brief to conform to subdivision (a)(5) of this rule and mere modifications of the original brief would not be accepted. *McNeil v. Lillard*, 79 Ark. App. 69, 86 S.W.3d 389 (2002).

Because town's brief failed to include an abstract of the hearing on the motion appealed and copies of pleading essential to an understanding of the case, the appellate court found the brief deficient and could not reach the merits of the case. *City of Dover v. City of Russellville*, 351 Ark. 557, 95 S.W.3d 808 (2003).

Defendant was ordered to submit a substituted brief that contained a revised abstract and addendum that included all relevant information necessary to an understanding of the issues presented on appeal where the abstract and the addendum were insufficient because (1) the abstract failed to mention the proceeding from which the abstracted testimony came, (2) the appellate court was left in the dark about what issues were raised sup-

porting suppression and what arguments were made opposing it, and (3) defendant failed to abstract the brief in support of the motion to suppress or, alternatively, to include a copy of that brief in the addendum. *Patrick v. State*, 358 Ark. 300, 188 S.W.3d 906 (2004).

Defendant failed to comply with subdivision (a)(5) of this rule during rebriefing because defense counsel again failed to abstract the material parts of the testimony of the witnesses and colloquies between the trial court and counsel and other parties that were necessary to an understanding of all questions presented to the appellate court for decision; however, rather than summarily affirming pursuant to subdivision (b)(3) of this rule, the appellate court, in its discretion, again ordered rebriefing to correct the abstracting deficiencies. *Spears v. State*, 82 Ark. App. 376, 109 S.W.3d 139 (Feb. 11, 2004).

In challenging the denial of sanctions in a workers' compensation proceeding, appellant was ordered to submit a substituted brief that contained an abstract of the hearing denying his motion for sanctions because it was apparent that the hearing held on appellant's motion was not abstracted in accordance with subdivision (a)(8) of this rule; a copy of the transcript from the hearing was improperly included in the addendum. *Calaway v. Dickson*, 360 Ark. 463, 201 S.W.3d 931 (2005).

On appeal from the denial of defendant's motion to suppress, neither the motion nor the supporting briefs were included in the record and the trial court's order denying the motion was not abstracted; as these documents were imperative to the review of his appeal, defendant was ordered to submit a substituted brief that included all the documents necessary to an understanding of the issues in the case. *Baker v. State*, 362 Ark. 242, 208 S.W.3d 96 (2005).

Abstract and addendum were deficient where the transcript of a hearing consisted of 57 pages, but the abstract of the hearing only consisted of 3 ½ pages, and a review of the record revealed that counsel for both parties had engaged in several colloquies concerning the arguments raised on appeal which were not included in the abstract. *Pro-Comp Mgmt. v. R.K. Enters., LLC*, 365 Ark. 111, 225 S.W.3d 389 (2006).

Petition for a writ of prohibition requesting that the circuit court be directed to transfer a workers' compensation case to the state workers' compensation commission was denied without prejudice where the petitioner ailed to include the employee's complaint, the answer, and the motion to transfer, as required by subdivision (a)(8) of this rule and failed to include an abstract of the hearing on the motion to transfer, as required by subdivision

(a)(5) of this rule. *Erin, Inc. v. Circuit Court*, 368 Ark. 595, 247 S.W.3d 849 (2007).

County's brief on its appeal of a circuit court order was deficient under subdivision (a)(8) (2006) of this rule where its addendum did not include the complaint for declaratory judgment, the motion for summary judgment, the brief in support of the motion for summary judgment, the answer, or any of the other pleadings considered by the circuit court in reaching its determination. *White County v. Cities of Judsonia, Kensett, & Pangburn*, 368 Ark. 603, 247 S.W.3d 863 (2007).

In a breach of contract case, a brief filed by a lessor did not comply with subdivision (a)(5) of this rule because it contained an insufficient abstract. The inclusion of a copy of each transcript was not sufficient. *Hanners v. Giant Oil Co. of Ark., Inc.*, 369 Ark. 226, 253 S.W.3d 424 (2007).

In a case on review from the appellate court's reversal of defendant's drug convictions, rebriefing was ordered because defendant's brief was not in compliance with subdivision (b)(3) of this rule, as a copy of defendant's suppression motion was not included in the addendum, and defendant's abstract of the suppression hearing did not contain the arguments made by counsel at the hearing. *Yarbrough v. State*, 369 Ark. 280, 253 S.W.3d 464 (2007).

Construction company was ordered to file a substituted addendum and brief in its appeal of orders granting motions to dismiss and for summary judgment because the construction company submitted a brief without a proper addendum, in violation of subdivision (a)(8) of this rule; the addendum lacked relevant pleadings essential to an understanding of the case. *Bryan v. City of Cotter*, 2009 Ark. 172, 303 S.W.3d 64 (2009).

Purported landowner raised various issues on appeal, but, contrary to subdivision (a)(5) of this rule, he failed to include a complete trial transcript in the record and he failed to provide a proper abstract of the transcript that included all material parts of the testimony as were necessary to an understanding of all questions presented to the court for decision. *Chiodini v. Lock*, 2009 Ark. 343, 322 S.W.3d 9 (2009).

—Flagrant Deficiencies.

Abstract that was flagrantly deficient would ordinarily be grounds for sanctions; however, appeal was salvaged by the state's supplemental abstract and the fact that appeal was from a capital case with a sentence of life without parole which all but necessitated review. *King v. State*, 312 Ark. 89, 847 S.W.2d 37 (1993) (decision under prior rule).

When an abstract's deficiencies are so flagrant that a decision is well nigh impossible, the Supreme Court will affirm. *Haynes v. State*, 313 Ark. 407, 855 S.W.2d 313 (1993).

Where the crucial document necessary for an understanding of one argument was not abstracted, and the only testimony abstracted was that which could be construed as favorable to the appellant's second argument; these egregious acts of omission and commission go far beyond mere oversight and constitute a gross violation of subdivision (a)(6) of this rule. *Haynes v. State*, 314 Ark. 354, 862 S.W.2d 275 (1993).

Incomplete abstract held not to be "flagrantly deficient." *Fight v. State*, 314 Ark. 438, 863 S.W.2d 800 (1993).

A cumbersome abstract held not "flagrantly deficient." *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993).

Chancellor's decision affirmed pursuant to subdivision (b)(2) of this rule due to the appellant's flagrantly deficient abstract. *Sturch v. Sturch*, 316 Ark. 53, 870 S.W.2d 720 (1994).

Appeal dismissed because the deficiencies in the abstract were so flagrant that a decision was impossible. *McAdams v. Automotive Rentals, Inc.*, 319 Ark. 254, 891 S.W.2d 52 (1995), cert. denied 516 U.S. 844, 116 S. Ct. 132, 133 L. Ed. 2d 80 (1995).

Where three photographs, which had been admitted into evidence and which had been at issue in the appeal were not included as part of defendant's abstract, and those photographs were essential to understand the basis for the appeal, the Arkansas Supreme Court deemed the abstract to be flagrantly deficient and affirmed the judgment of conviction. *Coney v. State*, 319 Ark. 709, 894 S.W.2d 583 (1995).

Where abstract was flagrantly deficient because appellant failed to abstract any exhibit to its complaint, the Supreme Court affirmed the trial court's judgment for noncompliance with this Rule. *Chrysler Credit Corp. v. Scanlon*, 319 Ark. 758, 894 S.W.2d 885 (1995).

Where appellant's abstract was flagrantly deficient, all points of appeal were summarily affirmed. *Bohannon v. Arkansas State Bd. of Nursing*, 320 Ark. 169, 895 S.W.2d 923 (1995).

The appellate court would not consider defendant's argument that the trial court abused its discretion in admitting his "mug shot" into evidence where defendant failed to abstract the photograph as part of his appeal. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

Abstract consisting of a recitation of § 16-66-221, in its entirety, together with three paragraphs, was flagrantly deficient so trial court's judgment of noncompliance was affirmed. *D. Hawkins, Inc. v. Schumacher*, 322 Ark. 437, 909 S.W.2d 640 (1995).

Without an abstract of the original trial and without a complete abstract of the supplemental hearing, the appellate court was unable to render an informed decision on the issues raised; thus, the abstract was fla-

grantly deficient and did not address arguments challenging the findings made in the decree. *Bradford v. Bradford*, 49 Ark. App. 32, 894 S.W.2d 616 (1995).

Where transcripts of proceedings contained 200 pages but appellant's abstract consisted of only the two-page order of the trial court, the abstract was flagrantly deficient. *Jewell v. Arkansas State Bd. of Dental Exmrs.*, 324 Ark. 463, 921 S.W.2d 950 (1996).

Judgment affirmed where appellant's nine-page abstract of a 1500-page record was held to be flagrantly deficient. *Jewell v. Miller County Election Comm'n*, 327 Ark. 153, 936 S.W.2d 754 (1997).

Appellant's abstract was flagrantly deficient where they failed to abstract: (1) their complaint in the trial court and request for a trial de novo; (2) the order denying the motion for summary judgment; (3) their orally renewed motion for summary judgment and their arguments in support thereof; (4) the testimony at trial; (5) the final judgment from which they appealed; and (6) the notice of appeal. *Oliver v. Washington County*, 328 Ark. 61, 940 S.W.2d 884 (1997).

Chancellors' decree was affirmed under subdivision (b)(2) of this rule where appellant's abstract was flagrantly deficient. *Get Rid of It, Inc. v. City of Smackover*, 59 Ark. App. 93, 952 S.W.2d 192 (1997).

The appellees properly prepared a supplemental abstract and were entitled to fees and expenses where the appellants' abstract was flagrantly deficient. *Cottrell v. Cottrell*, 332 Ark. 352, 965 S.W.2d 129 (1998).

The court would summarily affirm a direct appeal since the appellant's abstract was flagrantly deficient where the appellant did not abstract any of the arguments made or testimony given to the trial court and the 6 page abstract did not supply adequate information with which to decide the complicated issues presented on appeal. *City of West Memphis v. City of Marion*, 332 Ark. 421, 965 S.W.2d 776 (1998).

The court would affirm the trial court's grant of summary judgment due to the appellants' flagrantly deficient abstract where the appellants failed to abstract any of the 5 ordinances they challenged and failed to abstract any of the evidence in the case. *Murders v. Garland County*, 332 Ark. 659, 966 S.W.2d 900 (1998).

Because the candidate provided the appellate court with a flagrantly deficient abstract, the appellate court ordered a rebriefing; the appellate court was unable to reach the merits of the case because the abstract failed to provide material testimony and colloquies necessary to understand the questions on appeal. *Jones v. Phillips County Election Comm'n*, 357 Ark. 384, 167 S.W.3d 662 (2004).

—Illustrative Cases.

For case showing several examples of insufficient abstracting, see *Bohannon v. Arkansas State Bd. of Nursing*, 320 Ark. 169, 895 S.W.2d 923 (1995).

In action involving construction of a will, where the will was never supplied in its entirety and it was a practical impossibility for seven justices to examine the single transcript filed, the Supreme Court affirmed the lower court's judgment given the failure to adequately abstract the will. In re *Estate of Brumley*, 323 Ark. 431, 914 S.W.2d 735 (1996).

Judgment summarily affirmed where the flagrantly deficient abstract contained only the information, immaterial motions and orders involving the appointment and substitution of counsel, and an order reflecting an earlier mistrial; missing from the abstract were references to the testimony, arguments, rulings, instructions, jury's findings, and the judgment of conviction. *Moore v. State*, 325 Ark. 468, 929 S.W.2d 149 (1996).

Several points on appeal from an aggravated robbery conviction not reached because the abstracting was deficient. *Wallace v. State*, 326 Ark. 376, 931 S.W.2d 113 (1996).

Judgment affirmed without reaching the merits of argument where the contract at issue was contained in the record but not abstracted. *Finnegan v. Johnson*, 326 Ark. 586, 932 S.W.2d 344 (1996).

Abstract held insufficient where the appellant failed to abstract the chancellor's order with findings and failed to reflect whether the legal arguments made on appeal were argued or ruled on by the chancellor. *Pulaski County Child Support Enforcement Unit v. Norem*, 328 Ark. 546, 944 S.W.2d 846 (1997).

Abstract held flagrantly deficient where appellant failed to abstract more than just the judgment and commitment order, the only pleading in the abstract was the information charging appellant, the statement of the case did not provide the crime of which appellant was convicted, and the notice of appeal was not abstracted. *Cannon v. State*, 58 Ark. App. 182, 947 S.W.2d 409 (1997).

Where appellant's record, abridgment of record, and citation of supporting legal authority were so deficient that the court could not consider and decide their arguments on appeal, appellee's request for dismissal was granted. *Garrison v. City of N. Little Rock*, 332 Ark. 103, 964 S.W.2d 185 (1998).

The court would affirm an order denying the defendant's petition for postconviction relief on the basis of his flagrantly deficient abstract where his argument raised issues of ineffectiveness of counsel, but his abstract contained neither his petition for relief nor the trial court's order denying it. *Johnson v. State*, 333 Ark. 1, 968 S.W.2d 51 (1998).

An abstract was insufficient to allow review where the appellant condensed a 219-page record into a seven-page abstract and, *inter alia*, failed to include the complete order appealed from. *Luttrell v. City of Conway*, 339 Ark. 408, 5 S.W.3d 464 (1999).

The court could not review the trial court's denial of a motion to recuse where the appellant failed to include in the abstract and record a transcript of the hearing on the motion. *Blunt v. Cartwright*, 342 Ark. 662, 30 S.W.3d 737 (2000).

The appellant's abstract was flagrantly deficient where all of the documents in the transcript that were necessary for an understanding of the questions presented in the appeal were not abstracted and, furthermore, the transcript did not contain all the orders necessary for appellate review of the case. *Greene v. Pack*, 343 Ark. 97, 32 S.W.3d 482 (2000).

A pro se appellant's abstract on appeal from a Water Well Construction Commission decision under the Administrative Procedure Act was flagrantly deficient where the abstract did not contain a summary of the pleadings and the order from which appeal was taken, the notice of appeal, or the commission's findings of fact and conclusions of law. *Stuart v. Arkansas Well Water Constr. Comm'n*, 343 Ark. 369, 37 S.W.3d 573 (2001).

Attorney's abstract on appeal of a decision of the Arkansas Supreme Court Committee on Professional Conduct was insufficient because it only abstracted comments by the Commission chairman; the defect was, however, cured by a supplemental abstract filed by the Office of Professional Conduct, and it was not necessary to rebrief the case. *Cortinez v. Ark. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003).

Where defendant had previously been ordered to rebrief his case due to an insufficient abstract and addendum, and the appellate court was not able to reach the merits of defendant's arguments because he again failed to show whether he presented his arguments on appeal to the trial judge for consideration, the appellate court affirmed defendant's conviction for attempting to manufacture a controlled substance. *Patrick v. State*, 359 Ark. 504, 199 S.W.3d 74 (2004).

After rebriefing, counsel again failed to abstract the material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as were necessary to an understanding of all questions presented; although the appellate court could affirm the decision of the trial court for failure to file a complying abstract, addendum, and brief within the prescribed time, it ordered rebriefing to correct the abstracting

deficiencies. *Spears v. State*, 85 Ark. App. 47, 146 S.W.3d 355 (2004).

— Understanding of Issues.

Appeals from probate court affirmed where the appellant failed to abstract those matters in the record necessary to an understanding of all questions presented on appeal. *Clardy v. Williams*, 319 Ark. 275, 890 S.W.2d 276 (1995).

Where appellant failed to abstract the pleadings, exhibits, orders and final judgment necessary to an understanding of all questions on appeal, the appellate court could not reach the issues it was asked to decide, and the judgment was affirmed for failure to comply with subdivision (b)(2) of this rule. *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995).

Minimum Requirements.

To decide an appeal, the court must, at an absolute minimum, know what the trial court ruled before it can possibly determine any error. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993) (decision under prior rule).

An abstract of appellant's petition for mandamus and the trial court's order dismissing his petition is necessary to the decision of the questions presented in an appeal therefrom. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993).

Appellant's argument on appeal was not considered and the point affirmed where appellant did not abstract any motion for a directed verdict or the trial court's ruling in violation of subdivision (a)(6) of this rule. *Moncrief v. State*, 325 Ark. 173, 925 S.W.2d 776 (1996).

Merits of appeal not considered where defendant failed to abstract the order appealed from and other critical documents. *King v. State*, 325 Ark. 313, 925 S.W.2d 159 (1996).

Because certain arguments by a property owner challenging an annexation were unsupported by authority or convincing argument, the court refused to consider the arguments. *Utey v. City of Dover*, 352 Ark. 212, 101 S.W.3d 191 (2003).

Photographs.

Where defendant appealed denial of motion to exclude photograph from evidence there was no need for a copy of the photograph in the appendix because the testimony in the appendix adequately described it. *Qualls v. State*, 306 Ark. 283, 812 S.W.2d 681 (1991) (decision under prior rule).

Issues involving photographs summarily affirmed where reproductions of the photographs were not supplied with the abstract. *Mosley v. State*, 325 Ark. 469, 929 S.W.2d 693 (1996).

Appeal issue involving photographs not considered where photographs were not re-

produced and attached to the abstract. *Douthitt v. State*, 326 Ark. 794, 935 S.W.2d 241 (1996).

In subdivision (a)(6) of this rule, the word "which" introduces a nonrestrictive subordinate clause adding additional information about photographs and other similar exhibits, and indicates that these types of exhibits cannot be abstracted in words. *Robinson v. State*, 348 Ark. 280, 72 S.W.3d 827 (2002).

It was not necessary for appellant to reproduce photographs and attach them to the abstract because the appellate court was able to fully understand the issue by reviewing a transcript of the testimony of the person who took the photographs. *Clem v. State*, 351 Ark. 112, 90 S.W.3d 428 (2002).

Although defendant failed to include copies of a compact disc or otherwise provide copies of photographic images of pornography that were introduced into evidence in a sexual assault case in his brief, the appellate court accepted counsel's explanation of the difficulties associated with reproducing the exhibit and the appellate court also accepted counsel's request, in lieu of filing a formal motion, to waive the requirement of reproducing the pornographic photographs in the addendum. *Blanchard v. State*, 104 Ark. App. 31, 289 S.W.3d 129 (2008), rev'd, 2009 Ark. 335, — S.W.3d — (2009).

Photostats and Copies.

The photostating of a written instrument is only permissible when the overall view of the written instrument affects its credibility; even then the lawyer should abstract the exhibit and in addition point out that a photostatic copy is enclosed in the pocket part of the brief. *Bank of Ozark v. Isaacs*, 263 Ark. 113, 563 S.W.2d 707 (1978) (decision under prior rule).

The use of typewritten, photographed, or xeroxed copies of written exhibits, such as deeds, insurance policies, and similar instruments or documents is contrary to the provision allowing the attachment to abstracts and briefs of only those exhibits which cannot be abstracted in words. *Lewis v. Miller*, 263 Ark. 154, 563 S.W.2d 435 (1978) (decision under prior rule).

Pro Se Litigants.

Pro se litigants are held to the abstracting requirement of this rule. *Fruit v. Lockhart*, 304 Ark. 457, 802 S.W.2d 930 (1991); *Jewell v. Arkansas State Bd. of Dental Exmrs.*, 324 Ark. 463, 921 S.W.2d 950 (1996).

Procedure Where Abstract Defective.

Judgment or decree affirmed due to non-compliance with this rule. *Baker v. Trotter*, 253 Ark. 247, 486 S.W.2d 7 (1972); *Aings v. Gibson*, 272 Ark. 60, 613 S.W.2d 87 (1981); *Gatewood v. Little Rock Pub. Schs.*, 2 Ark. App. 102, 616 S.W.2d 784 (1981); *Berry v.*

Springdale Water & Sewer Comm'n, 276 Ark. 364, 635 S.W.2d 236 (1982); *Rapley v. Lindsey Constr. Co.*, 5 Ark. App. 31, 631 S.W.2d 844 (1982); *Bridger v. Mooney*, 278 Ark. 225, 644 S.W.2d 929 (1983); *Board of Educ. v. Ozark Sch. Dist. No. 14*, 280 Ark. 15, 655 S.W.2d 368 (1983); *Peterson Indus., Inc. v. Farmer*, 288 Ark. 298, 705 S.W.2d 8 (1986); *Trout v. Mathis*, 289 Ark. 24, 708 S.W.2d 629 (1986); *Blount v. Hughes*, 292 Ark. 166, 728 S.W.2d 519 (1987); *King v. King*, 292 Ark. 336, 730 S.W.2d 224 (1987); *National Lumber Co. v. Advance Dev. Corp.*, 293 Ark. 1, 732 S.W.2d 840 (1987); *Cash v. Holder*, 293 Ark. 537, 739 S.W.2d 538 (1987); *Harrison v. State*, 300 Ark. 439, 779 S.W.2d 536 (1989); *Pennington v. City of Sherwood*, 304 Ark. 362, 802 S.W.2d 456 (1991); *Fruit v. Lockhart*, 304 Ark. 457, 802 S.W.2d 930 (1991) (preceding decisions under prior rule); *Watson v. State*, 313 Ark. 304, 854 S.W.2d 332 (1993).

Although furnishing of abstract was not compliance with this rule, decree would not be affirmed for noncompliance where abstract was sufficient to determine question raised. *Goodloe v. Goodloe*, 253 Ark. 550, 487 S.W.2d 593 (1972); *Civil Serv. Comm'n v. Reid*, 261 Ark. 42, 546 S.W.2d 413 (1977) (preceding decisions under prior rule); *McGarrah v. McGarrah*, 325 Ark. 81, 924 S.W.2d 453 (1996).

Under former subdivision (e)(2) (now subdivision (b)(2)) of this rule, the court determines on its own motion, when the case is submitted on its merits, whether the judgment or decree should be affirmed for appellant's noncompliance with rule relating to reproduction of exhibits or whether appellant's attorney may be allowed to reprint his brief. *Van Marion v. Moseley*, 259 Ark. 740, 536 S.W.2d 697 (1976) (decision under prior rule).

Where appellants failed to abstract those portions of appeal record containing the appellee's pretrial memorandum and the holdings of the court, dismissal of the appeal under former subsection (e) (now subsection (b)) of this rule was not proper since the appellee elected in her brief to cure the deficiency by abstracting the missing portions and the cost of printing the missing portion of the abstract was allowed to the appellee. *Gautney v. Rapley*, 2 Ark. App. 116, 617 S.W.2d 377 (1981) (decision under prior rule).

When an appellant's abstract is deficient, the Supreme Court's practice is to rely on the record if it shows that the trial court's decision should be affirmed on a particular point, but not to explore the record for prejudicial error if none is shown by the abstract. *Smith v. State*, 278 Ark. 462, 648 S.W.2d 792, cert. denied 464 U.S. 890, 104 S. Ct. 232, 78 L. Ed. 2d 225 (1983).

Where abstract consists almost entirely of word for word reproductions of pleadings, etc.,

the court will dismiss the petition. *Oaklawn Jockey Club, Inc. v. Jameson*, 280 Ark. 150, 655 S.W.2d 417 (1983) (decision under prior rule).

Where abstract is not flagrantly deficient and does not involve an unreasonable or unjust delay of disposition of appeal, the merits of appeal will be considered. *Little Rock Elec. Contractors v. Okonite Co.*, 294 Ark. 399, 744 S.W.2d 381 (1988) (decision under prior rule).

Where appellant's abstract falls considerably short of the requirements of this rule, but is not "flagrantly" deficient under former subdivision (e)(2) (now subdivision (b)(2)) of this rule, the judgment can be reversed and the cause remanded for trial. *Linder v. Howard*, 296 Ark. 414, 757 S.W.2d 549 (1988) (decision under prior rule).

Where appellants failed to comply with subsection (d) of the former rule by not including any pleadings, verdict, notice of appeal, or any posttrial motions, but the court found from a reading of the briefs and the appendices that sufficient material parts necessary for an understanding of the questions at issue were presented, the court rendered a decision on the merits. *Montgomery v. Butler*, 309 Ark. 491, 834 S.W.2d 148 (1992) (decision under prior rule).

Rebriefing Not Required.

There was no need to order rebriefing as allowed by subdivision (b)(3) of this rule, because the parties agreed at the revocation hearing that the state filed its revocation petition after the suspended sentence period had expired, and that fact was the only fact about the petition that was material to the appellate court's jurisdictional analysis. *Owens v. State*, 2009 Ark. App. 532, 337 S.W.3d 527 (2009).

Rebriefing Ordered.

Rebriefing was ordered, where appellants' substituted brief referred to page citations in the record, not the abstract or addendum, in contravention of subdivision (a)(6) of this rule. *Marlow v. United Sys. of Ark.*, 2012 Ark. App. 265, — S.W.3d —, 2012 Ark. App. LEXIS 378 (Apr. 18, 2012).

Record.

Motions for considerations of the record on a prior appeal are unnecessary in light of former subsection (d) (now subdivision (a)(6)) of this rule. *Marshall v. State*, 264 Ark. 34D, 603 S.W.2d 393 (1980) (decision under prior rule).

Where counsel for the appellant does not provide the appellate court either with an exact quotation of the instrument in question or with an abstract of it, but merely refers to an exhibit in the transcript, the appellate court cannot consider the claims of the appellant. *Zini v. Perciful*, 289 Ark. 343, 711 S.W.2d 477 (1986) (decision under prior rule).

Former subsection (d) (now subdivision (a)(6)) of this rule imposes on the defendant the duty of furnishing the court with such an abridgment of the record as will enable the court to understand the issues presented on appeal; references to the transcript contained in argument is not a substitute for a proper record. *Wright v. State*, 17 Ark. App. 24, 702 S.W.2d 811 (1986) (decision under prior rule).

That a pertinent point on appeal has been omitted from the record is an unacceptable excuse for a failure to properly abstract. *Jones v. State*, 314 Ark. 383, 862 S.W.2d 273 (1993), cert. denied 512 U.S. 1237, 114 S. Ct. 2743, 129 L. Ed. 2d 863 (1994).

It is fundamental that the record on appeal is confined to that which is abstracted; a judgment may be affirmed for noncompliance with this rule since the failure to abstract a critical document precludes the reviewing court from considering issues concerning it. In re *Estate of Brumley*, 323 Ark. 431, 914 S.W.2d 735 (1996).

Petition for a writ of prohibition, seeking to prevent a trial in violation of speedy-trial limits, denied without addressing the merits of the petition, where defendant failed to produce a record that demonstrated that the writ was warranted. *Sherwood v. Glover*, 331 Ark. 124, 958 S.W.2d 526 (1998).

Appellate court granted a father's motion to unseal the record of the in camera testimony of two minor children in a child custody case as leaving the record sealed would prevent the father from complying with the requirement in RAP-Civ 6 and this rule that an appellant include a transcript of relevant testimony and abstract the record in its brief; a suggested alternative that appellate court consider the record in camera but leave the transcripts sealed was not an adequate substitute. *McNair v. Johnson*, 75 Ark. App. 261, 57 S.W.3d 742 (2001).

In a child custody matter, the record on appeal was missing the transcript from the hearing on the mother's motion for a change of venue, and the father tacitly consented to the abbreviated record by failing to object to it; as a result, the mother was ordered to provide a certified supplemental record that included the missing transcript pursuant to Ark. R. App. P. Civ. 6(c) and (e) and to file a substituted brief that included an abstract of the relevant testimony and argument of counsel pursuant to subsection (a) of this rule. *Thomas v. Avant*, 369 Ark. 211, 252 S.W.3d 135 (2007).

Res Judicata.

Where appellant had previously sought to appeal his decree and had his decree affirmed for failure to comply with former subsection (d) (now subdivision (a)(6)) of this rule, and where he then moved to set it aside for a violation of § 9-12-317, the chancellor cor-

rectly concluded that all issues presented in the motion to set aside the decree were res judicata due to the prior affirmance of the decree. *May v. May*, 267 Ark. 27, 589 S.W.2d 8 (1979) (decision under prior rule).

Second Appeal.

Because subdivision (a)(5) of this rule expressly provides that an appellant on a second appeal shall include a condensation of all pertinent portions of the record filed for the prior appeal, the appellant did not need to move for leave to consolidate the record. *Ward v. McCord*, 60 Ark. App. 91, 957 S.W.2d 190 (1997), dismissed 966 S.W.2d 925 (1998).

Sequence of Points.

Where a proper treatment of the issues on appeal has been rendered extremely difficult because appellees elected not to follow the same sequence and arrangement of points as contained in appellant's brief as required by this rule, counsel should give some logical and persuasive reason for not following this rule designed to expedite the disposition of appeals. *Keenan v. Peevy*, 267 Ark. 218, 590 S.W.2d 259 (1979) (decision under prior rule).

Showing of Disrespect.

Where language in appellant's brief was offensive and disrespectful to the trial court, the pages in the brief containing that language were stricken from the appellate court's records, as a sanction for violating the rule. *Henry v. Eberhard*, 309 Ark. 336, 832 S.W.2d 467 (1992) (decision under prior rule).

Statement of Case.

A ten-page statement of appellants' case on appeal goes far beyond the requirements of this rule that such statements should ordinarily not exceed two pages in length. *Hazen v. City of Booneville*, 260 Ark. 871, 545 S.W.2d 614 (1977) (decision under prior rule).

Where appellant's abstract did not contain a concise statement of the case without argument as required by former subsection (b) (now see subdivision (a)(3)) of this rule, the Supreme Court had to affirm the trial court's judgment under former subdivision (e)(2) (now subdivision (b)(2)) of this rule. *Smith v. Bullard*, 271 Ark. 794, 610 S.W.2d 888 (1981) (decision under prior rule).

Where the defendant submitted a pro se brief, which lacked a statement of the case, points for reversal, and an abstract of the record, and a motion for permission to file it late, the brief could not be filed regardless of the appellant's reason for filing it late because it was grossly deficient. *Roberts v. State*, 288 Ark. 640, 707 S.W.2d 324 (1986) (decision under prior rule).

Appellant's preliminary statement that was three and one-half pages in length and statement of the case that was one and one-half pages, totalling five pages, with statements

that were perhaps less than balanced in their description of the facts, was not overly long and argumentative so as to warrant that either statement be struck. *Daley v. Boroughs*, 310 Ark. 274, 835 S.W.2d 858 (1992) (decision under prior rule).

In spite of the facts concerning the number of pages of the record, the number of exhibits, and the number of findings of fact by the chancellor, the appellant was not justified in writing a 19-page statement of the case, which was in reality a lengthy introductory argument that failed entirely to comply with this rule. *Riddick v. Streett*, 313 Ark. 706, 858 S.W.2d 62 (1993) (decision under prior rule).

Statement of Points and Authorities.

Where the appellant's "points and Authorities" section of his brief covered one full page without setting forth what the trial court did wrong, instead of the one-sentence statement of error to which a point for reversal is generally limited under former subsection (c) (now see subdivisions (a)(4) and (5)) of this rule, and where the "points and authorities" section was divided into three sections, containing a total of at least 17 citations of authority, contrary to the two sections to which it is restricted under former subsection (c) (now see subdivisions (a)(4) and (5)) of this rule, the Supreme Court affirmed the trial court under former subdivision (e)(2) (now subdivision (b)(2)) of this rule. *Smith v. Bullard*, 271 Ark. 794, 610 S.W.2d 888 (1981) (decision under prior rule).

General questions of law may not be substituted for a concise statement of points of error relied on for a reversal of a judgment or decree. *Myers v. Muuss*, 281 Ark. 188, 662 S.W.2d 805 (1984) (decision under prior rule).

Because the point on appeal was not developed legally or factually, this was enough to affirm the trial court in its holding that §§ 23-89-305(a) and 23-89-306 were constitutional as applied to the facts; the court refused to consider the issue because the insured failed to cite to any legal authority as required. *Johnson v. Encompass Ins. Co.*, 355 Ark. 1, 130 S.W.3d 553 (2003).

Substantial Compliance.

Although the abstract was excessive and burdensome, the court opted to review the case on the merits due to a considerable condensation of a many volume record and a manifest effort to comply with this rule. *Forrest City Mach. Works, Inc. v. Mosbacher*, 312 Ark. 578, 851 S.W.2d 443 (1993) (decision under prior rule).

In reviewing the trial court's revocation of a suspended sentence, the conditions of suspension are a material part of the record necessary to an understanding of the questions presented, and thus parts of the record relating to the suspension need to be abstracted;

however, as long as the appellate court can determine from a reading of the briefs and appendices the material parts necessary for an understanding of the questions at issue, it will render a decision on the merits. *Kirby v. State*, 52 Ark. App. 161, 915 S.W.2d 736 (1996).

Candidate's appeal challenging the trial court's determination that the candidate could not be certified as the winner of a school board election was denied, and the trial court's decision was affirmed, because the candidate was given an opportunity to file a substituted brief, abstract, and addendum, and the documents remained deficient; the candidate did not provide the court with the petition for a writ of mandamus or the declaratory judgment as part of the addendum. *Jones v. Phillips County Election Comm'n*, 358 Ark. 339, 190 S.W.3d 273 (2004).

Substitute Brief.

Subdivision (b)(2) of this rule clearly contemplates the filing of a substituted brief by an appellant after an appellee's brief has been filed, even when the appellee has called attention to the appellant's abstract deficiency in its reply brief. *Daffron v. State*, 325 Ark. 411, 926 S.W.2d 662 (1996).

On review of the circuit court's temporary award of custody, where there was no transcript from the hearing, appellant was ordered to file a substituted brief that included an abstract of the relevant testimony and argument of counsel essential to an understanding of the case and the issues presented on appeal. *Gilbert v. Moore*, 362 Ark. 657, 210 S.W.3d 125 (2005).

On review of an order granting summary judgment, the brief-in-support of the motion, the response brief, and the arguments of counsel made at the summary judgment hearing were missing from the appellate record; thus, appellants were ordered to file a substituted brief that included an abstract and addendum of the relevant testimony and pleadings that were essential to the court's understanding of the case. *Verdier v. Verdier*, 362 Ark. 660, 210 S.W.3d 123 (2005).

Even if no witnesses testified at the hearing on the claimant's motion for jury trial, the colloquies or arguments by counsel to the circuit court were necessary for appellate analysis of the circuit court's decision on the motion. Appellant was ordered to file a substituted brief, including an abstract of the relevant colloquies between the circuit court and counsel. *Selmon v. Metro. Life Ins. Co.*, 371 Ark. 306, 264 S.W.3d 547 (2007).

Defendant, who appealed a conviction for capital murder and sentence of life imprisonment, was ordered to file a substitute appellate brief because defendant's brief failed to comply with subdivisions (a)(5) and (b)(3) of this rule and Ark. Sup. Ct. & Ct. App. R.

4-3(h); defendant failed to abstract the renewals of a directed-verdict motion, failed to reference the record in certain portions of the abstract, and failed to abstract the testimony of the state's rebuttal witnesses. *Jackson v. State*, 2009 Ark. 94, 302 S.W.3d 605 (2009).

Defendant was ordered to file a substituted appellate brief because the brief failed to comply with subdivision (a)(8) of this rule and Ark. Sup. Ct. & Ct. App. R. 4-3(h); defendant failed to include the judgment and commitment order from which the appeal was taken, failed to include a timely notice of appeal, and failed to include the trial court's letter opinion denying a motion in limine. *Williams v. State*, 2009 Ark. 279, 308 S.W.3d 622 (2009).

Pursuant to Ark. R. App. P. Civ. 6(c) and (e), the court ordered the purported landowner to (1) supply the court with a certified, supplemental record that included a complete trial transcript and the proof of service, if part of the proceedings below, within 60 days of the issuance of this opinion, and (2) file a substituted brief that included an abstract of the complete trial transcript and an addendum as required by subdivision (a)(5) of this rule. *Chiodini v. Lock*, 2009 Ark. 343, 322 S.W.3d 9 (2009).

Substituted Abstract.

Where the appellant's attorney filed a brief without a proper abstract of the testimony, and the Court of Appeals denied the appellant's motion to be allowed to file a supplemental abstract and brief, but permitted counsel to file a substituted abstract and brief, and thereafter the appellant's counsel disregarded the plain language of both this rule and the court order by filing a mere supplemental abstract and brief, the supplemental abstract and brief would be treated as the appellant's only one in the case, since this rule does not contemplate that anything less than a complete, substituted abstract and brief could be filed under those circumstances. *Smith v. State*, 278 Ark. 462, 648 S.W.2d 792, cert. denied 464 U.S. 890, 104 S. Ct. 232, 78 L. Ed. 2d 225 (1983).

Substituted Addendum.

Under the modified abstracting rules, where appellant former city marshal failed to include in his addendum copies of the municipal ordinances that were necessary for an understanding of the merits of the appeal, he was granted 15 days to file a substituted addendum that complied with subdivision (a)(8) of this rule. *Vanderpool v. Pace*, 350 Ark. 460, 87 S.W.3d 796 (2002).

Under the modified abstracting rules, where appellants' addendum did not contain the pleadings necessary to an understanding of the merits of the appeal, appellants had 15 days from the date of the opinion to file a

substituted addendum to conform to the rule. *Dodge v. Lee*, 350 Ark. 480, 88 S.W.3d 843 (2002).

Where the financial company appealed the summary judgment granted in favor of officials of the Arkansas Department of Finance and Administration, the financial company failed to include copies of the parties' motions or the briefs in support thereof in its addendum. Because the brief was not in compliance with subsection (b) of this rule, the financial company was ordered to file a substituted addendum. *CitiFinancial Retail Servs. Div. v. Weiss*, 371 Ark. 421, 266 S.W.3d 740 (2007).

Sufficiency of Abstract.

Motions to dismiss an appeal on the ground that appellant failed to abstract the record are not recognized; appellee has the option of supplying the deficiency, and if he elects to submit a proper abstract, he thereby waives any objection to the defect. *Brace v. Busboon*, 261 Ark. 556, 549 S.W.2d 802 (1977) (decision under prior rule).

Appellants are not required to abstract irrelevant parts of the record but only those parts pertinent to the appeal, even though appellees designate the entire contents of the record for appeal purposes. *Peevy v. Ritcheson*, 261 Ark. 841, 552 S.W.2d 218 (1977) (decision under prior rule).

A party who has not provided a separate abstract of the record can supply the deficiency in his brief on appeal. *Adams v. Planters Prod. Credit Ass'n*, 262 Ark. 734, 561 S.W.2d 80 (1978) (decision under prior rule).

Appellant is required to abstract only such material parts of the record as are necessary for the court to fully understand the questions presented, and where the issues on appeal involve only a portion of the proceedings, it is wholly unnecessary for appellant to utilize over numerous pages of his brief to abstract the testimony presented at trial. *Kirk v. State*, 270 Ark. 983, 606 S.W.2d 755 (1980) (decision under prior rule).

The pertinent parts of written exhibits that can be abstracted in words should be so abstracted. *Jackson v. Kinark Corp.*, 282 Ark. 548, 669 S.W.2d 898 (1984) (decision under prior rule).

It is the appellant's burden to present an abstract that sufficiently demonstrates reversible error. *Burgess v. Burgess*, 286 Ark. 497, 696 S.W.2d 312 (1985) (decision under prior rule).

Basic pleadings and judgment or decree appealed from are essential constituents of the abstract. *Davis v. Wingfield*, 297 Ark. 57, 759 S.W.2d 219 (1988) (preceding decisions under prior rule).

A narrative statement which merely recites in the barest terms the general question for review does not constitute an abstract. *D.J. v.*

State, 308 Ark. 37, 821 S.W.2d 782 (1992) (decision under prior rule).

Although the failure to comply with this section by not abstracting a motion for directed verdict generally precludes appellate review of that issue, affirmation for noncompliance with this rule is not necessarily warranted when the needed information can be gained from some other part of the abstract. *Integon Indem. Corp. v. Bull*, 311 Ark. 61, 842 S.W.2d 1 (1992) (decision under prior rule).

The court would affirm a grant of summary judgment on the basis that the appellant filed a flagrantly deficient abstract where the abstract condensed a 160-page record into 4 pages, condensed a 7-page order into half a page and filing was insufficient to allow the court to determine whether any genuine issues of material fact remained. *Morse v. Sentry Life Ins. Co.*, 332 Ark. 605, 967 S.W.2d 557 (1998).

Although a photocopy of a juvenile adjudication order attached to the end of the appellant's brief was not a substitute for proper abstracting, the court would nevertheless address the appellant's claim that the chancellor improperly failed to seal and expunge the record of the adjudication since the court could glean sufficient information from the abstract of the chancellor's bench ruling. *L.H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998).

In a civil forfeiture case, although the notice of appeal designated a partial record, the abstract and addendum contained the material parts of the forfeiture proceeding and all relevant pleadings necessary to an understanding of the issue raised in the case. \$ 735 in *U.S. Currency v. State*, 90 Ark. App. 358, 205 S.W.3d 816 (2005).

Supplemental Abstract.

An initial abstracting deficiency cannot be cured in the reply brief, as the appellee at that late date does not have the opportunity to supply any deficiencies in the appellant's abstract. *Weston v. Ponder*, 263 Ark. 370, 565 S.W.2d 31 (1978) (decision under prior rule).

If an appellee believes the appellant has failed to abstract a pertinent part of the record, then it is up to the appellee to do so, not merely to suggest something may have been omitted. *Valley Forge Life Ins. Co. v. Gaskins*, 264 Ark. 655, 573 S.W.2d 630 (1978) (decision under prior rule).

Where appellee's brief contains a misstatement, appellant's option is to file a reply brief correcting the misstatement. *Huth v. Division of Social Servs. of Dep't of Human Servs.*, 287 Ark. 294, 700 S.W.2d 367 (1985) (decision under prior rule).

It is appellant's burden to present an abstract that will sufficiently show the error; however, if the appellant's abstract demonstrates error and a portion of the record has been omitted that would support the court's

finding, the appellee must respond under former subdivision (e)(1) (now subdivision (b)(1)) of this rule and supply the deficiency in the abstract. *RAD-Razorback Ltd. Partnership v. B.G. Coney Co.*, 289 Ark. 550, 713 S.W.2d 462 (1986) (decision under prior rule).

If appellee considers appellants' abstract to be deficient, he has the option of supplying the deficiency or leaving it unsupplied. *King v. King*, 292 Ark. 336, 730 S.W.2d 224 (1987) (decision under prior rule).

Where the error was made by appointed counsel, the court permitted a deficient abstract to be supplemented. *Wilson v. State*, 306 Ark. 179, 810 S.W.2d 337 (1991) (decision under prior rule).

Where there was no testimony included in the supplemental abstract, there was no need for the abstract to be written in the first person. *Harvison v. Charles E. Davis & Assocs.*, 310 Ark. 104, 835 S.W.2d 284 (1992) (decision under prior rule).

The provision of this rule, allowing an appellee to cure a deficient abstract by submitting a supplemental abstract is not a mandatory requirement; however, regardless of whether an appellee calls a deficient abstract to the court's attention, it is a matter the court considers when the case is submitted on the merits. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993) (decision under prior rule).

Where four pages of the abstract were single-spaced in violation of S. Ct. & Ct. App. R. 4-1(a), and certain material testimony was omitted in violation of this rule, but the omitted material was supplied by the state in a supplemental abstract, the abstract was held not to be flagrantly deficient. *Johnson v. State*, 319 Ark. 3, 888 S.W.2d 661 (1994).

Appellant's motion to supplement his abstract was granted and appellant's attorney allowed time to revise his brief to conform to the requirements of subdivision (a)(6) of this rule where granting the motion would not cause an unjust delay. *Dixon Ticonderoga Co. v. Winburn Tile Mfg. Co.*, 322 Ark. 817, 911 S.W.2d 955 (1995).

Although defendant-appellant's abstract was flagrantly deficient, the State-appellee cured this deficiency by including the necessary material in its supplemental abstract. *Williams v. State*, 325 Ark. 432, 930 S.W.2d 297 (1996).

Although a photocopy of a juvenile adjudication order attached to the end of the appellant's brief was not a substitute for proper abstracting, the court would nevertheless address the appellant's claim that the chancellor improperly failed to seal and expunge the record of the adjudication since the court could glean sufficient information from the abstract of the chancellor's bench ruling. *L.H. v. State*, 333 Ark. 613, 973 S.W.2d 477 (1998).

Although the appellants' abstract was flagrantly deficient, the appellees provided an adequate supplemental abstract and, therefore, the court had a sufficient record to reach the issues. *Hooker v. Deere Credit Servs., Inc.*, 62 Ark. App. 293, 971 S.W.2d 267 (1998).

The appellees were entitled to an award of costs, including reasonable attorney fees, for the preparation of a supplemental abstract where the appellants presented a flagrantly deficient abstract and the supplementation was necessary for the court to reach an understanding of the appeal. *Hooker v. Deere Credit Servs., Inc.*, 62 Ark. App. 293, 971 S.W.2d 267 (1998).

Appellant failed to provide an abstract of the material parts of the record from the administrative hearing, as required by subdivision (a)(5) of this rule, which was fatal error prior to the rebriefing rule under subdivision (b)(3) of this rule; however, appellee filed a supplemental abstract which was sufficient to allow the appellate court to proceed with the merits of the case. *Groce v. Dir., Ark. Dep't of Human Servs.*, 82 Ark. App. 447, 117 S.W.3d 618 (2003).

Testimony.

Abstracting dialogue or testimony in the first person is much easier on both the one making the abstract and the one reading the abstract. *Edwards v. Neuse*, 312 Ark. 302, 849 S.W.2d 479 (1993) (decision under prior rule).

Videotapes.

Although a bulky videotape does not readily lend itself to abstracting in a brief the way photographs do, the failure to abstract the prejudicial parts of a videotape precludes appellate consideration of the videotape on appeal. *Donihoo v. State*, 325 Ark. 483, 931 S.W.2d 69 (1996).

A videotape does not ordinarily lend itself to abstracting in a brief, but the failure to abstract the prejudicial parts of a videotape or a transcript thereof precludes consideration of the videotape on appeal. *Evans v. State*, 326 Ark. 279, 931 S.W.2d 136 (1996).

A description of what is on a videotape and how it is irrelevant, unconstitutional, and prejudicial must be included in the abstract. *Hodge v. State*, 329 Ark. 57, 945 S.W.2d 384 (1997).

The court would not consider the argument that the trial court erred in allowing the jury to see a video in which he was dressed in an orange prison jumpsuit since the video was not provided in the abstract or record. *Efurd v. State*, 334 Ark. 596, 976 S.W.2d 928 (1998).

When Abstract Not Necessary.

Claimants for unemployment benefits are not required to abstract the record under former Rule 7 (now Rule 4-4) or the former rule, since petitions for review from decisions of the board of review are not treated the

same as other civil cases under the appellate rules. *Hunter v. Daniels*, 2 Ark. App. 94, 616 S.W.2d 763 (1981) (decision under prior rule).

Abstracting requirement regarding the contents of a 911 tape that was introduced into evidence at trial was waived. *Novak v. State*, 53 Ark. App. 75, 918 S.W.2d 218 (1996).

An appeal from an order denying postconviction relief is not a second or subsequent appeal, and thus subdivision (a)(6) of this rule is not directly applicable. *Drymon v. State*, 327 Ark. 375, 938 S.W.2d 825 (1997).

Cited: *Bryant v. McAlister*, 247 Ark. 859, 448 S.W.2d 13 (1969); *Townsend Paneling, Inc. v. Butler*, 247 Ark. 818, 448 S.W.2d 347 (1969); *Arkansas State Hwy. Comm'n v. Spence*, 254 Ark. 423, 494 S.W.2d 469 (1973); *Umholtz v. Allen*, 254 Ark. 722, 495 S.W.2d 874 (1973); *Russell v. Pryor*, 264 Ark. 45, 568 S.W.2d 918 (1978); *Ford v. State*, 264 Ark. 141, 569 S.W.2d 105 (1978), cert. denied 441 U.S. 947, 99 S. Ct. 2170 (1979); *Travelers Ins. Co. v. Martin*, 264 Ark. 266, 571 S.W.2d 416 (1978); *Ladd v. Ladd*, 265 Ark. 45, 576 S.W.2d 178 (1979); *Brandenburg v. Brooks*, 264 Ark. 939, 576 S.W.2d 196 (1979); *Cluck v. Mack*, 264 Ark. 842, 576 S.W.2d 930 (1979); *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979); *Parker v. State*, 265 Ark. 134, 577 S.W.2d 414 (1979); *Cantrell v. State*, 265 Ark. 263, 577 S.W.2d 605 (1979); *First Am. Nat'l Bank v. McClure Constr. Co.*, 265 Ark. 792, 581 S.W.2d 550 (1979); *Beavers v. State*, 267 Ark. 154, 589 S.W.2d 572 (1979); *Wade v. Franklin Stricklin Land Surveyors, Inc.*, 264 Ark. 841, 575 S.W.2d 672 (1979), cert. denied 449 U.S. 883, 101 S. Ct. 235, 66 L. Ed. 2d 108 (1980); *Loveless v. City of Clarendon*, 270 Ark. 705, 606 S.W.2d 568 (1980); *Eaton v. Supreme Court*, 270 Ark. 573, 607 S.W.2d 55 (1980); *Byers v. State*, 267 Ark. 1097, 594 S.W.2d 252 (Ct. App. 1980); *DeFoure v. MFA Life Ins. Co.*, 268 Ark. 829, 596 S.W.2d 7 (1980); *Smith v. Stewart*, 268 Ark. 766, 596 S.W.2d 346 (1980), aff'd 601 S.W.2d 837 (Ark. 1980); *Daniels v. Daniels*, 269 Ark. 588, 599 S.W.2d 748 (1980); *Evans v. Commercial Nat'l Mtg. Co.*, 271 Ark. 271, 609 S.W.2d 79 (1980); *Gist v. Meredith Marine Sales & Serv., Inc.*, 272 Ark. 489, 615 S.W.2d 365 (1981); *Townsend v. Nesterenko*, 273 Ark. 454, 619 S.W.2d 673 (1981); *Stull v. Ragsdale*, 273 Ark. 277, 620 S.W.2d 264 (1981); *Gibson v. Boling*, 274 Ark. 53, 622 S.W.2d 180 (1981); *Giles v. Texarkana Sch. Dist. No. 7*, 275 Ark. 121, 627 S.W.2d 554 (1982); *Rodgers v. University of Ark. for Medical Sciences*, 275 Ark. 139, 628 S.W.2d 11 (1982); *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982); *Forsgren v. Forsgren*, 4 Ark. App. 286, 630 S.W.2d 64 (1982); *Cluck v. Mack*, 278 Ark. 506, 647 S.W.2d 442 (1983); *Downing v. Declerk*, 279 Ark. 23, 648 S.W.2d 449 (1983); *Heritage Ins. Co. v. White County*, 279 Ark.

94, 649 S.W.2d 170 (1983); *Baldwin Co. v. Ceco Corp.*, 280 Ark. 519, 659 S.W.2d 941 (1983); *Patton v. Williams*, 284 Ark. 187, 680 S.W.2d 707 (1984); *Arkansas State Hwy. Comm'n v. Vick*, 284 Ark. 372, 682 S.W.2d 731 (1985); *Brents v. State*, 285 Ark. 199, 686 S.W.2d 395 (1985); *United States v. Davidson*, 14 Ark. App. 194, 686 S.W.2d 455 (1985); *Duelmer v. Hand*, 286 Ark. 348, 692 S.W.2d 601 (1985); *Maples v. State*, 16 Ark. App. 175, 698 S.W.2d 807 (1985); *Gass v. State*, 16 Ark. App. 202, 699 S.W.2d 408 (1985); *Garner v. Foundation Life Ins. Co.*, 17 Ark. App. 13, 702 S.W.2d 417 (1986); *Yeager v. Roberts*, 288 Ark. 156, 702 S.W.2d 793 (1986); *Poyner v. State*, 288 Ark. 402, 705 S.W.2d 882 (1986); *Van Bibber v. Laster*, 289 Ark. 87, 709 S.W.2d 90 (1986); *Brown v. Nobles*, 289 Ark. 276, 711 S.W.2d 786 (1986); *Marshall v. State*, 289 Ark. 462, 712 S.W.2d 894 (1986); *Peoples Bank & Trust Co. v. Wallace*, 290 Ark. 589, 721 S.W.2d 659 (1986); *Highland Sch. Dist. v. Travenol Labs., Inc.*, 291 Ark. 563, 726 S.W.2d 670 (1987); *Ragar v. Hooper-Bond Ltd. Partnership Fund III*, 293 Ark. 182, 735 S.W.2d 706 (1987); *Fitzhugh v. State*, 293 Ark. 315, 737 S.W.2d 638 (1987); *Patterson v. State*, 295 Ark. 147, 747 S.W.2d 99 (1988); *Northwest Nat'l Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 25 Ark. App. 279, 757 S.W.2d 182 (1988); *Whitlock v. Smith*, 297 Ark. 399, 762 S.W.2d 782 (1989); *Delta Sch. of Commerce, Inc. v. Wood*, 298 Ark. 195, 766 S.W.2d 424 (1989); *Brown v. State*, 298 Ark. 396, 767 S.W.2d 313 (1989); *Taylor v. State*, 298 Ark. 632, 770 S.W.2d 135 (1989); *Loftin v. Crews & Assocs.*, 299 Ark. 1, 771 S.W.2d 16 (1989); *Rose City Property Owners' Ass'n v. Thorne*, 299 Ark. 29, 770 S.W.2d 655 (1989); *Stanton v. State*, 299 Ark. 54, 770 S.W.2d 147 (1989); *Cozart v. Lewis*, 299 Ark. 500, 774 S.W.2d 127 (1989); *Stewart v. State*, 300 Ark. 147, 777 S.W.2d 844 (1989); *Bonner v. McKee Baking Co.*, 29 Ark. App. 1, 776 S.W.2d 364 (1989); *Arkansas State Hwy. Comm'n v. Coffelt*, 301 Ark. 112, 782 S.W.2d 45 (1990); *Meyers Gen. Agency v. Lavender*, 301 Ark. 503, 785 S.W.2d 28 (1990); *Logan County v. Tritt*, 302 Ark. 81, 787 S.W.2d 239 (1990); *Rowell v. White & Assocs.*, 302 Ark. 225, 788 S.W.2d 489 (1990); *Ransopher v. Chapman*, 302 Ark. 480, 791 S.W.2d 686 (1990); *Burnette v. Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990); *Coley v. State*, 303 Ark. 254, 795 S.W.2d 356 (1990); *Ritchie v. State*, 31 Ark. App. 177, 790 S.W.2d 919 (1990); *Shaver v. Spann*, 35 Ark. App. 118, 813 S.W.2d 280 (1991); *Pennington v. City of Sherwood*, 304 Ark. 362, 802 S.W.2d 456 (1991); *Brooks v. City of Benton*, 308 Ark. 571, 826 S.W.2d 259 (1992); *Hooper v. State*, 309 Ark. 622, 833 S.W.2d 769 (1992); *First Nat'l Bank v. Griffin*, 310 Ark. 164, 832 S.W.2d 816 (1992), cert. denied 507 U.S. 919, 113 S. Ct. 1280, 122 L. Ed 2d 673 (1993); *Bangs v. State*,

310 Ark. 235, 835 S.W.2d 294 (1992) (preceding decisions under prior rule) Harshaw v. State, 313 Ark. 51, 852 S.W.2d 318 (1993) (decision under prior rule) Gaines v. State, 313 Ark. 561, 855 S.W.2d 956 (1993); Morgan v. Neuse, 314 Ark. 4, 857 S.W.2d 826 (1993); McCuen v. McGee, 315 Ark. 561, 868 S.W.2d 503 (1994); Miller v. Nix, 315 Ark. 569, 868 S.W.2d 498 (1994); Newton v. Chambliss, 316 Ark. 334, 871 S.W.2d 587 (1994); Pogue v. State, 316 Ark. 428, 872 S.W.2d 387 (1994); Kelleher v. City of Russellville, 48 Ark. App. 58, 891 S.W.2d 802 (1994); Hardaway v. State, 321 Ark. 576, 906 S.W.2d 288 (1995); D. Hawkins, Inc. v. Schumacher, 322 Ark. 437, 909 S.W.2d 640 (1995); Carr v. GMC, 322 Ark. 664, 911 S.W.2d 575 (1995); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); Hardy Constr. Co. v. Arkansas State Hwy. & Transp. Dep't, 324 Ark. 496, 922 S.W.2d 705 (1996); McPeck v. White River Lodge Enters., 325 Ark. 68, 924 S.W.2d 456 (1996); Carter v. State, 326 Ark. 497, 932 S.W.2d 324 (1996); ABC Home Health of Ark., Inc. v. Arkansas Health Servs. Comm'n, 326 Ark. 573, 932 S.W.2d 331 (1996); Richmond v. State, 326 Ark. 728, 934 S.W.2d 214 (1996); Reeves v. Hinkle, 326 Ark. 724, 934 S.W.2d 216 (1996); Childs v. Mid-Century Ins. Co., 55 Ark. App. 168, 934 S.W.2d 533 (1996); Lowell v. Lowell, 55 Ark. App. 211, 934 S.W.2d 540 (1996); Coleman's Serv. Ctr., Inc. v. FDIC, 55 Ark. App. 275, 935 S.W.2d 289 (1996); Smith v. State, 328 Ark. 736, 946 S.W.2d 667 (1997); Qualls v. Ferritor, 329 Ark. 235, 947 S.W.2d 10 (1997), cert. denied 522 U.S. 970, 118 S. Ct. 421 (1997); Lewis v. State, 330 Ark. 618, 955 S.W.2d 904 (1997); Evans v. State, 331 Ark. 240, 959 S.W.2d 745 (1998); Grayson v. Bank of Little Rock, 334 Ark. 180, 971 S.W.2d 788 (1998); Williams v. Martin, 335 Ark. 163, 980 S.W.2d 248 (1998); Pocahontas Fed. Sav. & Loan v. J.T. White Hdwe. & Lumber Co., 67 Ark. App. 378, 1 S.W.3d 471 (1999); Reynolds v. State, 68 Ark. App. 74, 4 S.W.3d 508 (1999); Hodges v. Cannon, 68 Ark. App. 170, 5 S.W.3d 89 (1999); In re D.J.L., 341 Ark. 327, 16

S.W.3d 263 (May 18, 2000); Craig v. State, 70 Ark. App. 71, 14 S.W.3d 893 (Apr. 19, 2000); Hashagen v. Lord, 341 Ark. 83, 14 S.W.3d 498 (2000); Fayetteville Diagnostic Clinic, Ltd. v. Turner, 71 Ark. App. 259, 29 S.W.3d 773 (2000), rev'd 42 S.W.3d 420 (Ark. 2001); Brinker v. Forrest City Sch. Dist. No. 7, 342 Ark. 646, 29 S.W.3d 740 (2000); Qualls v. White, 342 Ark. 681, 30 S.W.3d 735 (2000); McGehee v. State, 344 Ark. 602, 43 S.W.3d 125 (2001); Gaines v. State, 350 Ark. 535, 88 S.W.3d 858 (2002); Lewis v. State, 84 Ark. App. 327, 139 S.W.3d 810 (2004); Kyzar v. City of W. Memphis, 359 Ark. 366, 197 S.W.3d 502 (2004); Johnson v. Hargrove, 361 Ark. 109, 204 S.W.3d 520 (2005); Williams v. State, 362 Ark. 416, 208 S.W.3d 761 (2005); West v. West, 362 Ark. 456, 208 S.W.3d 776 (2005); Verdier v. Verdier, 364 Ark. 287, 219 S.W.3d 143 (2005); Crawford County v. Jones, 365 Ark. 585, 232 S.W.3d 433 (2006); Wilkins & Assocs. v. Vimy Ridge Mun. Water Improvement Dist. 139, 369 Ark. 50, 250 S.W.3d 246 (2007); Wagner v. GMC, 369 Ark. 85, 250 S.W.3d 557 (2007); City of Dardanelle v. City of Russellville, 371 Ark. 13, 262 S.W.3d 615 (2007); Landsnpulaski, LLC v. State Dep't of Corr., 371 Ark. 18, 262 S.W.3d 603 (2007); Rylwell, LLC v. Ark. Dev. Fin. Auth., 371 Ark. 21, 262 S.W.3d 617 (2007); Green v. Alpharma, Inc., 374 Ark. 67, 285 S.W.3d 665 (2008); Stilley v. Univ. of Ark. at Fort Smith, 374 Ark. 248, 287 S.W.3d 544 (2008); Lackey v. Mays, 103 Ark. App. 70, 286 S.W.3d 193 (2008); Whiteside v. Russellville Newspapers, Inc., 2009 Ark. 135, 295 S.W.3d 798 (2009); Stewart v. State, 2010 Ark. App. 9, — S.W.3d —, 2010 Ark. App. LEXIS 15 (Jan. 6, 2010); Rodriguez v. State, 2010 Ark. 78, — S.W.3d —, 2010 Ark. LEXIS 105 (Feb. 18, 2010); Fernandez v. State, 2010 Ark. 148, 362 S.W.3d 905 (2010); Klines v. State, 2010 Ark. App. 361, — S.W.3d —, 2010 Ark. App. LEXIS 372 (Apr. 28, 2010); Lamco Ltd. P'ship II v. Pasta Concepts, Inc., 2012 Ark. App. 145, — S.W.3d —, 2012 Ark. App. LEXIS 250 (Feb. 15, 2012).

Rule 4-3. Briefs in criminal cases.

(a) *Briefs in chief* — *When the state is the appellee.* In criminal cases in which the State is the appellee and in which appellant is not indigent, the appellant shall have 40 days from the date the transcript is lodged to file 17 copies of the brief with the Clerk. Upon the filing of the brief, the appellant shall submit proof of service of two additional copies of the brief upon the Attorney General and one copy upon the circuit court, except as otherwise provided in (f).

(b) *Briefs in chief* — *When the state is the appellant.* In criminal cases in which the State is the appellant, the procedure shall be the same as in subsection (a) except the State shall file only 17 copies of the brief with the

Clerk and furnish evidence of service upon opposing counsel and the circuit court, except as otherwise provided in (f).

(c) *Appellee's brief.* The appellee shall have 30 days from the filing of the appellant's brief to file 17 copies of the brief with the Clerk and such further abstract and Addendum as may be necessary to a fair determination of the case. Proof of service upon opposing counsel and the circuit court is required, except as otherwise provided in (f).

(d) *Reply brief.* The appellant shall have 15 days from the date that the appellee's brief is filed to file 17 copies of the reply brief and furnish evidence of service upon the opposing counsel and the circuit court.

(e) *Page limits on briefs.* The argument portion of the appellant's and the appellee's briefs shall not exceed 30 double-spaced typewritten pages including the conclusion, if any, with a 15 typewritten page limit upon the reply brief, except that if either limitation is shown to be too stringent in a particular case, and there has been a good faith effort to comply with the page limits, it may be waived on motion.

(f) *Sealing of child pornography.* If a brief contains photographs, DVDs, or any other visual medium alleged by either party to the appeal to constitute child pornography, a motion to seal the brief, stating the reason therefor, must accompany the brief when it is filed with the Clerk of the Court. Only the court, its personnel, and the attorneys of record shall be provided with copies of briefs containing the materials to be sealed. All other persons to be served with the brief shall receive copies which do not contain the materials to be sealed.

(g) *Misdemeanor cases subject to dismissal.* In misdemeanor cases, failure of the appellant to file a brief within the time limit renders the case subject to dismissal as in civil cases pursuant to Rule 4-5.

(h) *Appellant's duty to abstract record.* In all felony cases it is the duty of the appellant, whether represented by retained counsel, appointed counsel or a public defender, or acting pro se, to abstract such parts of the transcript and to include in the Addendum such parts of the record, but only such parts, as are material to the points to be argued in the appellant's brief.

(i) *Court's review of errors in death or life imprisonment cases.* When the sentence is death or life imprisonment, the Court must review all errors prejudicial to the appellant in accordance with Ark. Code Ann. Sec. 16-91-113(a). To make that review possible, the appellant must abstract, or include in the Addendum, as appropriate, all rulings adverse to him or her made by the circuit court on all objections, motions and requests made by either party, together with such parts of the record as are needed for an understanding of each adverse ruling. The Attorney General will make certain and certify that all of those objections have been abstracted, or included in the Addendum, and will brief all points argued by the appellant and any other points that appear to involve prejudicial error.

(j) *Preparation of briefs for indigent appellants.* When an indigent appellant is represented by appointed counsel or a public defender, the attorney may have the briefs reproduced by submitting one unbound double-spaced typewritten manuscript to the Attorney General and one to the Clerk not later than the due date of the brief. In such instances, the time for the filing of the Attorney General's brief is extended by five days.

(k) *Withdrawal of counsel.*

(1) Any motion by counsel for a defendant in a criminal or a juvenile delinquency case for permission to withdraw made after notice of appeal has

been given shall be addressed to the Court, shall contain a statement of the reason for the request and shall be served upon the defendant personally by first-class mail. A request to withdraw on the ground that the appeal is wholly without merit shall be accompanied by a brief including an abstract and Addendum. The brief shall contain an argument section that consists of a list of all rulings adverse to the defendant made by the circuit court on all objections, motions and requests made by either party with an explanation as to why each adverse ruling is not a meritorious ground for reversal. The abstract and Addendum of the brief shall contain, in addition to the other material parts of the record, all rulings adverse to the defendant made by the circuit court.

(2) The Clerk shall furnish the appellant with a copy of the appellant's counsel's brief, and advise the appellant that he or she has 30 days within which to raise any points that he or she chooses, and that this may be done in typewritten or hand printed form and accompanied by an affidavit that no paid assistance from any inmate of the Department of Correction or of any other place of incarceration has been received in the preparation of the response.

(3) The Clerk shall serve all such responses by an appellant on the Attorney General, who shall file a brief for the State, pursuant to sections (e) and (j) of this Rule, within 30 days after such service and serve a copy on the appellant, as well as on the appellant's counsel.

(4) After a reply brief has been filed, or after the time for filing such a brief has expired, the motion for withdrawal shall be submitted to the Court as other motions are submitted. If, upon consideration of the motion, it shall appear to the Court that the judgment of the circuit court should be affirmed or reversed, the Court may take such action on its own motion, without any supporting opinion.

(1) *Continuances and extensions of time.*

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven (7) calendar days upon oral request. If such an extension is granted, no further extension shall be granted except by the Clerk for compliance with these Rules as provided in Rule 4-2(c) or by the Court upon a written motion showing good cause.

(2) Stipulations of counsel for continuances will not be recognized. Any request for an extension of time (except in (1)(1)) for the filing of any brief must be made by a written motion, addressed to the Court, setting forth the facts supporting the request. Eight copies of the motion are required. Counsel who delay the filing of such a motion until it is too late for the brief to be filed if the motion is denied, do so at their own risk. (Amended May 31, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended January 22, 2004; amended April 1, 2004; amended February 10, 2005; amended September 18, 2008, effective October 1, 2008; amended October 29, 2009, effective January 1, 2010.)

Reporter's Notes to Rule 4-3 (2008): A 2008 amendment added subsection (f) and relettered the subsequent paragraphs.

Publisher's Notes. The Arkansas Supreme Court issued the following Per Curiam on February 13, 1978: "PER CURIAM. In recent years a practice has grown up by which counsel attach to their abstracts and briefs

typewritten, photographed, or Xeroxed copies of *written* exhibits, such as deeds, insurance policies, and similar instruments or documents. This practice is contrary both to Rules 8 and 11 [now Rules 4-1 and 4-3], which require that abstracts and briefs be *printed*, and to Rule 9 (d), as amended on February 9, 1976 [now Rule 4-2(6)], which provides for the

attachment of only those exhibits 'which cannot be abstracted in words.' Counsel's failure to abstract such exhibits frequently makes it impossible for the members of the court to

properly consider the exhibits as reproduced. Effective April 1, 1978, the clerk will not accept abstracts and briefs not complying in this respect with the court's rules."

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

U. Ark. Little Rock L.J. Survey — Criminal Procedure, 11 U. Ark. Little Rock L.J. 187.

U. Ark. Little Rock L. Rev. Supreme Court of Arkansas Rule 4-3(J): No-Merit Briefs in Arkansas and the Need to Amend the Rule, 24 U. Ark. Little Rock L. Rev. 313.

CASE NOTES

ANALYSIS

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Constitutionality.

There is no constitutional right to comparative review or plain error review. *Hill v. Lockhart*, 791 F. Supp. 1388 (E.D. Ark. 1992) (decision under prior rule).

In General.

Even in capital cases, the Arkansas Supreme Court requires a defendant to have taken some action at trial to protect himself against perceived prejudice, and to point out those actions in the appeal; the state attorney general, as appellee, has the duty of double-checking a defendant's work to make sure all rulings adverse to the defendant are abstracted and briefed. *Gardner v. Norris*, 949 F. Supp. 1359 (E.D. Ark. 1996).

In the fifth review of petitioner's case, the

Supreme Court of Arkansas held that no errors under subsection (h) of this rule, *Wicks* errors, or errors implicating "other fundamental safeguards" occurred during the trial; however, the supreme court could recall a mandate and reopen a case in "extraordinary circumstances," and did so where petitioner, relying on *Willett v. State*, asserted a deficiency in the verdict forms, and where a federal district court dismissed petitioner's habeas corpus petition in order to give state courts the opportunity to explore the issue. *Robbins v. State*, 353 Ark. 556, 114 S.W.3d 217 (2003).

Abstract Insufficient.

On a motion by the defendant's attorney to withdraw as counsel in connection with the appeal of the revocation of the defendant's probation, the abstract was deficient where the terms and conditions of the defendant's probation were not abstracted and where the petition for revocation was not sufficiently abstracted. *Taylor v. State*, 63 Ark. App. 82, 973 S.W.2d 840 (1998).

The abstract and brief submitted by the appellant did not comply with the rule and rebriefing would be ordered where (1) although the appellant pled guilty to an earlier charge and received a term of probation and the appellant challenged the revocation of his probation, the terms and conditions of the probation were not abstracted, and (2) the brief failed to cite any authorities and contained no argument. *Taylor v. State*, 63 Ark. App. 82, 973 S.W.2d 840 (1998).

Abstract of Objections.

In appeal from a capital felony murder conviction in which the appellant was sentenced to life imprisonment without parole, it was the appellant's duty to abstract all objections that were decided adversely to her in the trial court. *Curry v. State*, 270 Ark. 570, 605 S.W.2d 748 (1980) (decision under prior rule).

Where the prosecuting attorney's comments during closing argument, indeed the expressions complained of, were so interlaced

and interwoven that they constituted one theme that extended throughout the entire argument, defense counsel's motion for mistrial encompassed and preserved on appeal all the expressions at issue, not just the remarks prompting or preceding the objection. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), *aff'd* 65 F.3d 676 (8th Cir. 1995).

Where state moved to direct appellant to comply with subsection (h) of this rule, alleging that the brief did not comply with subsection (h) because of insufficient abstracting, and appellant alleged that his brief did comply with subsection (h), the appellate court denied the motion and, in light of the extensive delays in the case and pursuant to the state's burden under subsection (h) to "make certain and certify that all of those objections have been abstracted," directed the state to file a supplemental abstract instead. *McGehee v. State*, 327 Ark. 88, 937 S.W.2d 632 (1997).

Abstract of Pre-Trial Hearing.

This rule requires the appellant in felony cases to abstract such parts of the record as are material to the points to be argued in the brief, and absent an abstract of the pre-trial hearing on the appellant's motion to suppress the results of a blood alcohol test, the court of appeals will look only to the abstract of the record of the trial proper to determine the asserted error on appeal in admitting evidence of the blood test. *Nicholas v. State*, 268 Ark. 541, 595 S.W.2d 237 (Ct. App. 1980) (decision under prior rule).

Occasionally the court will grant a waiver of the 25-page limit, but only if the party can demonstrate that the limits cannot in fairness be met. *Pemberton v. State*, 291 Ark. 198, 723 S.W.2d 372 (1987) (decision under prior rule).

Appellate Review.

Defendant's failure to make motions for directed verdict with specificity regarding the issue of the sufficiency of evidence of his intent in a first-degree murder case equated to the motion never having been made. Subsection (h) of this rule did not mandate review of the point regarding requisite intent when the directed-verdict motion was not properly made. *Brown v. State*, 374 Ark. 324, 287 S.W.3d 587 (2008).

Civil Action.

Because a petition for writ of mandamus against the Department of Correction challenging the computation of a parole eligibility date is a civil action, the appellant was not permitted to file a supplemental brief as a matter of course. *Patterson v. Smith*, 289 Ark. 564, 712 S.W.2d 922 (1986) (decision under prior rule).

Appointed counsel for an indigent parent on a first appeal from an order terminating pa-

rental rights may petition the court to withdraw as counsel if, after a conscientious review of the record, counsel can find no issue of arguable merit for appeal. *Lewis v. Ark. Dep't of Human Servs.*, 364 Ark. 243, 217 S.W.3d 788 (2005).

Compliance Required.

Motion to direct appellant to file a brief in compliance with subsections (g) and (h) of this rule granted. *Stephens v. State*, 326 Ark. 401, 929 S.W.2d 722 (1996).

Copies of Briefs.

A petition challenging a condition of parole is a civil action; there is no right under our rules or any constitutional provision to have a brief in a civil case duplicated at public expense. *Maxie v. Gaines*, 317 Ark. 229, 876 S.W.2d 572 (1994).

Duty to Abstract Record.

Subsection (g) of this rule provides that it is the duty of the appellant in a criminal case, even though the appellant may be acting pro se, to abstract such parts of the record which are material to the points to be argued in the appellant's brief. *Jackson v. State*, 316 Ark. 509, 872 S.W.2d 400 (1994).

The failure to abstract a critical document precludes the Supreme Court from considering issues concerning it. *Jackson v. State*, 316 Ark. 509, 872 S.W.2d 400 (1994).

Although defendant filed a motion to dismiss for lack of a speedy trial, his abstract did not reflect the trial court's ruling on his motion, violating subsection (g) of this rule; thus, this argument was not addressed on appeal. *Manning v. State*, 318 Ark. 1, 883 S.W.2d 455 (1994), criticized *Witherspoon v. State*, 891 S.W.2d 371 (1995).

Attorney jailed for five days for criminal contempt and for his willful and continued disobedience of the Supreme Court's per curiam orders directing him to file the abstract and brief in a criminal appeal. *Pipkin v. State*, 320 Ark. 159, 896 S.W.2d 432 (1995), appeal dismissed in part 898 S.W.2d 54 (1995).

The appellate court would not consider defendant's argument that the trial court abused its discretion in admitting his "mug shot" into evidence where defendant failed to abstract the photograph as part of his appeal. *Bunn v. State*, 320 Ark. 516, 898 S.W.2d 450 (1995).

In reviewing the trial court's revocation of a suspended sentence, the conditions of suspension are a material part of the record necessary to an understanding of the questions presented, and thus parts of the record relating to the suspension need to be abstracted; however, as long as the appellate court can determine from a reading of the briefs and appendices the material parts necessary for an understanding of the questions at issue, it

will render a decision on the merits. *Kirby v. State*, 52 Ark. App. 161, 915 S.W.2d 736 (1996).

An abstract is required even in a “no merit” appeal. *Johnson v. State*, 333 Ark. 1, 968 S.W.2d 51 (1998).

Where corporation failed to to abstract the February 26, 2004, hearing before the circuit court on appellees’ motion for preliminary injunction, the corporation was directed to file a substituted brief in accordance with the briefing schedule set by the clerk of the appellate court upon entry of the circuit court’s order. *Baptist Health v. Murphy*, 362 Ark. 506, 209 S.W.3d 360 (2005).

Duty to Examine Record.

Where the appellant had been sentenced to life imprisonment without parole, it was the duty of both the counsel for the appellant and counsel for the state to examine the trial record page by page to be certain that all the objections are brought to the court’s attention on appeal. *Curry v. State*, 270 Ark. 570, 605 S.W.2d 748 (1980) (decision under prior rule).

When life is at stake, the Supreme Court will make its own examination of the record and reject or accept on their merits all objections made at trial, whether or not argued on appeal, but it will not consider a matter in the absence of an objection. *Fretwell v. State*, 289 Ark. 91, 708 S.W.2d 630 (1986) (decision under prior rule).

Without proper abstracting, seven justices would be constrained to pore through the sole record of the case on file with the Clerk of the Supreme Court in search of the error pro-pounded; the Supreme Court will not go to the record in research of prejudicial error. *Haynes v. State*, 313 Ark. 407, 855 S.W.2d 313 (1993).

Appellate court needed the complete record designated by a defendant who was appealing his conviction and life sentence for capital murder in order to fulfill its duty under § 16-91-113 and subsection (h) of this rule to conduct an independent review of the record for prejudicial error; thus, the trial court personnel were ordered to provide the missing parts of the record within 30 days. *Howell v. State*, 350 Ark. 47, 84 S.W.3d 442 (2002).

Pursuant to subsection (h) of this rule, the record was reviewed for all objections, motions, and requests made by either party, which were decided adversely to defendant, and no prejudicial error was found. *Travis v. State*, 371 Ark. 621, 269 S.W.3d 341 (2007).

Forms.

The use of typewritten, photographed, or Xeroxed copies of written exhibits, such as deeds, insurance policies, and similar instruments or documents is contrary to the requirement that abstracts and briefs be printed. *Lewis v. Miller*, 263 Ark. 154, 563 S.W.2d 435 (1978) (decision under prior rule).

Frivolous Appeal.

Counsel filing *Anders* brief stating that the appeal of a criminal defendant’s conviction has no merit and is frivolous must attach the complete record of the proceedings below to the record on appeal so that the trial court can determine if the appeal is truly frivolous. *Campbell v. State*, 74 Ark. App. 277, 53 S.W.3d 48 (2001).

Defense counsel’s compliance with subsection (j) of this rule was sufficient such that an appeal of defendant’s probation revocation would be wholly without merit. *Brown v. State*, 85 Ark. App. 382, 155 S.W.3d 22 (2004).

At hearing, the state proved by a preponderance of the evidence that defendant had violated at least one of the conditions of his probation, that he failed to pay restitution to his victims, and defendant’s belief, even if it was an honest belief, that he only owed \$6,207 in restitution, not \$12,000, did not explain why he failed to pay at least some restitution to the victims; the appellate court agreed with defendant’s counsel that the appeal had no merit, thus, defendant’s conviction was affirmed and counsel’s motion to withdraw was granted. *McCrary v. State*, — Ark. App. —, — S.W.3d —, 2005 Ark. App. LEXIS 24 (Jan. 12, 2005).

When defendant was placed on two years’ probation on his plea of guilty to possession of cocaine, one of the conditions was that he not violate any state law; defendant’s plea of guilty to criminal trespass was sufficient to support the finding that he violated his probation. His appellate counsel filed an *Anders* brief that complied with subdivision (k)(1) of this rule by showing that an adverse evidentiary ruling and the denial of his motion for continuance at the revocation hearing was not prejudicial; the Court of Appeals of Arkansas held that counsel was permitted to withdraw representation, because defendant’s appeal of the revocation order lacked merit. *Johnson v. State*, 2009 Ark. App. 527, 334 S.W.3d 419 (2009).

In a criminal case, on direct appeal, a no-merit brief that fails to address an adverse ruling must be re-briefed because it does not satisfy the requirements of subdivision (k)(1) of this rule; by requiring every adverse ruling to be abstracted and briefed, the due process concerns in *Anders* are met, and the unnecessary risk of a deficient *Anders* brief resulting in an incorrect decision on trial counsel’s motion to withdraw is avoided. *Sartin v. State*, 2010 Ark. 16, 362 S.W.3d 877 (2010).

Counsel’s motion to withdraw on the ground that defendant’s appeal of an order finding that he violated the conditions of his suspended imposition of sentence by failing to pay child support since pleading guilty to nonpayment of support would be wholly without merit was granted because defendant did

not raise any pro se points for reversal, and no objections were made by either party that were decided adversely against defendant; the state presented testimony that the victim had not received any payments in more than six months, the child-support registry was introduced without objection, and defendant himself testified that he had failed to pay child support since he had pleaded guilty to the charge of nonpayment of support. *Vick v. State*, 2010 Ark. App. 29, — S.W.3d —, 2010 Ark. App. LEXIS 41 (Jan. 13, 2010).

Insufficient Brief.

Defendant was properly convicted of capital murder and arson after he told a neighbor that his trailer home exploded while his girlfriend was inside; further, the appellate court would not review his claim that the multiple convictions violated double jeopardy because the argument was not sufficiently briefed. *Meadows v. State*, 358 Ark. 396, 191 S.W.3d 527 (2004).

Defendant, who appealed a conviction for capital murder and sentence of life imprisonment, was ordered to file a substitute appellate brief because defendant's brief failed to comply with Ark. Sup. Ct. & Ct. App. R. 4-2(a)(5) and (b)(3) and subdivision (h) of this rule; defendant failed to abstract the renewals of a directed-verdict motion, failed to reference the record in certain portions of the abstract, and failed to abstract the testimony of the state's rebuttal witnesses. *Jackson v. State*, 2009 Ark. 94, 302 S.W.3d 605 (2009).

Defendant was ordered to file a substituted appellate brief because the brief failed to comply with Ark. Sup. Ct. & Ct. App. R. 4-2(a)(8) and subsection (h) of this rule; defendant failed to include the judgment and commitment order from which the appeal was taken, failed to include a timely notice of appeal, and failed to include the trial court's letter opinion denying a motion in limine. *Williams v. State*, 2009 Ark. 279, 308 S.W.3d 622 (2009).

As appellate counsel's Anders' brief did not address all of the adverse rulings against defendant, it did not meet the requirements of subdivision (k)(1) of this rule; appellate counsel failed to address the denial of defendant's request that the trial court consider the running of defendant's prison time concurrent with the time defendant was already serving. *Williams v. State*, 2011 Ark. App. 35, — S.W.3d —, 2011 Ark. App. LEXIS 47 (Jan. 19, 2011).

Jury Instructions.

A proper consideration of an asserted error in instructing the jury requires that the court have before it in the brief the instructions given by the court, and where the appellant has failed to include in his brief all of a specific instruction and has set out only the

one sentence to which he objects, and he has set out none of the other instructions given, on appeal the court assumes the jury was properly instructed. *Ellis v. State*, 267 Ark. 690, 590 S.W.2d 309 (Ct. App. 1979) (decision under prior rule).

The Arkansas rule that has been followed in misdemeanor and civil cases of requiring the instructions to be briefed when error is assigned for the giving or refusing of an instruction should now be followed in felony criminal cases. *Ellis v. State*, 267 Ark. 690, 590 S.W.2d 309 (Ct. App. 1979) (decision under prior rule).

The court does not consider an assigned error concerning instructions absent an abstract of the instructions given, and will assume the jury was properly instructed. *Ellis v. State*, 267 Ark. 690, 590 S.W.2d 309 (Ct. App. 1979) (decision under prior rule).

An appellant is not required to abstract all the instructions given by the trial court as a predicate to an objection on appeal to failure by the trial court to give an instruction proffered by the appellant. *Hunter v. State*, 8 Ark. App. 283, 653 S.W.2d 159 (1983) (decision under prior rule).

The court's failure to give an instruction on simple possession because the marijuana could have been for defendant's "own personal use" was proper because requested instruction was not abstracted under subdivision (f) of the former rule and the proof did not obligate the trial court to give the instruction. *Dollar v. State*, 287 Ark. 61, 697 S.W.2d 868 (1985) (decision under prior rule).

Motion to Direct Compliance.

Where the trial record totalled over 1,700 pages, and the defendant's abstract of the trial totalled only 17 pages, the state, as the opposing party, should have moved for compliance with subsection (h) of this rule, and the court would have granted the motion to direct compliance and sent the case back for abstracting. *Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

No-Merit Brief.

The procedure for filing of a no-merit brief is governed by Anders v. California, 386 U.S. 738 (1967) and subdivision (j)(1) of this rule; the test is not whether counsel thinks the trial court committed no reversible error, but rather whether the points to be raised on appeal would be "wholly frivolous." *Tucker v. State*, 47 Ark. App. 96, 885 S.W.2d 904 (1994).

Rebriefing ordered where the no-merit brief were insufficient and did not comply with the requirements of subsection (j) of this rule. *Skiver v. State*, 326 Ark. 914, 935 S.W.2d 248 (1996).

Without an adequate brief that contains an

abstract of the record, the supreme court cannot make a reasoned decision as to whether counsel is entitled to be relieved on the ground that the appeal is without merit. *Mitchell v. State*, 327 Ark. 285, 938 S.W.2d 814 (1997).

The substituted no-merit brief, just like its predecessor, was not in compliance with subsection (j) of this rule and *Anders v. California*, 386 U.S. 738 (1967). *Skiver v. State*, 330 Ark. 432, 954 S.W.2d 913 (1997).

Counsel's brief on his motion to withdraw on the basis that there were no meritorious grounds for appeal was inadequate and he would be ordered to rebrief the case where counsel did not adequately explain any of the adverse rulings in the trial or why each of the adverse rulings was not a meritorious ground for appeal. *Adaway v. State*, 62 Ark. App. 272, 972 S.W.2d 257 (1998).

Appellate court was not able to determine whether defendant's counsel's no-merit brief met the requirements of subsection (j) of this rule where the notice of appeal only designated specific portions of the record where error may have occurred and did not allow the court to review the entire record for potential error as it was required to do under subsection (j); thus, remand of the case was required so that defendant's counsel could appropriately supplement the record. *McCoy v. State*, 74 Ark. App. 414, 49 S.W.3d 154 (2001), *aff'd* 347 Ark. 913, 69 S.W.3d 430 (2002).

Where mother appealed the judgment terminating her parental rights, counsel filed a no-merit brief; however, the brief failed to abstract at least three rulings adverse to the mother in the termination hearing, thus, counsel's motion to withdraw was denied, and a rebriefing was ordered. *Causar v. Ark. Dep't of Human Servs.*, 93 Ark. App. 483, 220 S.W.3d 270 (2005).

Counsel was relieved, because counsel provided a compliant "no merit" brief demonstrating that an appeal would be wholly without merit. *Caldwell v. State*, 2009 Ark. App. 526, 334 S.W.3d 82 (2009).

Because counsel's no-merit brief complied with subdivision (k)(1) of this rule, and the issue of credibility of the parties during a probation revocation hearing was for the trial court, counsel was permitted to withdraw from defendant's appeal of his probation revocation for drinking in the street, a violation of one of his conditions of probation. *Graves v. State*, 2010 Ark. App. 32, — S.W.3d —, 2010 Ark. App. LEXIS 34 (Jan. 13, 2010).

Motion to withdraw, filed by defendant's appellate counsel, was granted as counsel complied with the requirements of subsection (k) of this rule by filing a brief listing and discussing all the rulings adverse to defendant and explaining why there would be no

merit to an appeal. *Lambert v. State*, 2011 Ark. App. 258, — S.W.3d —, 2011 Ark. App. LEXIS 270 (Apr. 6, 2011).

Objections.

Both this rule and former ARCrP 36.24 require review of the record for error in life and death cases, but this review presupposes that an objection was made at trial. *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993) (decision under prior rule).

Where the issue of admissibility of certain evidence was raised by defendant before and during trial, a further examination of this issue was required under subsection (h) of this rule. *Walker v. State*, 313 Ark. 478, 855 S.W.2d 932 (1993).

Although there were some examples of sarcasm, snide remarks, and discourtesy on the part of the trial judge, as well as defense counsel which could not be condoned, where defendant failed to object to this conduct or make a record or ask the judge to recuse, the issue of bias could not be raised on appeal. *Franklin v. State*, 314 Ark. 329, 863 S.W.2d 268 (1993), overruled *MacKintrush v. State*, 334 Ark. 390, 978 S.W.2d 293 (1998).

Because it was incumbent on counsel to make a specific objection for the court's review on appeal, even in the face of the trial judge's negative response to defense counsel's request to make an objection, no reversible error was shown. *White v. State*, 2009 Ark. 374, 326 S.W.3d 421 (2009).

Prejudicial Error.

No prejudicial error found. *Woodruff v. State*, 313 Ark. 585, 856 S.W.2d 299 (1993); *Wallace v. State*, 314 Ark. 247, 862 S.W.2d 235 (1993); *Davis v. State*, 314 Ark. 257, 863 S.W.2d 259 (1993), cert. denied 511 U.S. 1026, 114 S. Ct. 1417, 128 L. Ed. 2d 88 (1994); *Jones v. State*, 314 Ark. 289, 862 S.W.2d 242 (1993); *Simmons v. State*, 314 Ark. 310, 862 S.W.2d 245 (1993); *Mitchell v. State*, 314 Ark. 343, 862 S.W.2d 254 (1993).

Affidavits from members of the petit jury stating that defendant could not receive a fair trial due to pretrial publicity were not enough to show that the trial court abused its discretion in denying defendant's motion for change of venue; the trial court took extensive precautions to ensure defendant a fair trial, all jurors who were possibly tainted with pretrial publicity were dismissed, and defendant voiced his approval of each juror selected. *Porter v. State*, 359 Ark. 323, 197 S.W.3d 445 (2004).

Reimbursement of Reproduction Costs.

When an indigent defendant represented by appointed counsel or a public defender proceeds under subsection (g) of the former rule, it is suggested that the original brief be filed with the clerk and that two copies be served on the Attorney General with the re-

quest that the additional copies be made and filed by that office; it would then be proper to seek allowance by the Court of Appeals of the reproduction costs of the two copies served on the Attorney General. *Hughes v. State*, 4 Ark. App. 32, 627 S.W.2d 33 (1982) (decision under prior rule).

Where the court-appointed counsel for an indigent defendant failed to follow the procedure in former subsection (g) (now (i)) of this rule for reproducing the required number of copies of the defendant's abstract and brief, the attorney's motion for reimbursement of the reproduction costs was denied. *Hughes v. State*, 4 Ark. App. 32, 627 S.W.2d 33 (1982) (decision under prior rule).

Reply Brief.

An argument cannot be raised for the first time in the reply brief. *Jordan v. State*, 323 Ark. 628, 917 S.W.2d 164 (1996).

Supreme Court of Arkansas holds that the current rules for no-merit briefs in termination-of-parental-rights cases, subsection (j) of this rule and Ark. Sup. Ct. R. 6-9, do not expressly require the Arkansas Department of Health and Human Services to file a reply brief to a parent's pro se points on appeal. *Posey v. Ark. HHS*, 370 Ark. 500, 262 S.W.3d 159 (2007).

Party raised an issue in his reply brief, but the court did not address arguments raised for the first time in a reply brief. *Bilo v. El Dorado Broad. Co.*, 101 Ark. App. 267, 275 S.W.3d 660 (2008).

Review in Death or Life Imprisonment Cases.

The standard of review employed by the Arkansas Supreme Court to determine the sufficiency of the evidence to support the jury's findings, relative to the aggravating circumstances in death or life imprisonment cases, should be a "reasonable doubt" analysis. *Miller v. Lockhart*, 861 F. Supp. 1425 (E.D. Ark. 1994), aff'd 65 F.3d 676 (8th Cir. 1995).

Because defendant received a sentence of life imprisonment without the possibility of parole, and because the state had not briefed defendant's objection to the admission of hearsay testimony at trial, the Supreme Court believed it was necessary to discuss this issue. *Griffin v. State*, 322 Ark. 206, 909 S.W.2d 625 (1995).

The Arkansas Supreme Court is required by § 16-91-113 to review all errors prejudicial to the rights of the appellant in a case where a death sentence is imposed; this obligation is implemented through court procedure as outlined in subsection (h) of this rule and RAP-Crim 14. *Gardner v. Norris*, 949 F. Supp. 1359 (E.D. Ark. 1996).

Where defendant made no objection in the trial court to codefendant's assertion of the

Fifth Amendment, but raised the issue for the first time on appeal, the Supreme Court would not consider it; even in cases where life without parole is imposed, the Court's duty is only to examine the record for error in objections made at trial and decided adversely to defendant. *Allen v. State*, 324 Ark. 1, 918 S.W.2d 699 (1996).

Criminal appellant failed to comply with subsection (h) of this rule when he had only abstracted the parts of the record which pertained to the one issue he raised on appeal; because the appellant was sentenced to life without parole, subsection (h) requires that the appellant abstract all rulings adverse to him. *Bowden v. State*, 326 Ark. 266, 931 S.W.2d 104 (1996).

While it is true that subsection (h) of this rule requires the Arkansas Supreme Court to review the record for error in life and death cases, this review presupposes that an objection was made at trial; where defendant failed to make a specific motion for directed verdict under ARCrP 33.1 indicating the particular deficiencies in the State's proof, it was as if he failed to object at all, and that failure below precluded review of the sufficiency of the evidence on appeal. *Webb v. State*, 327 Ark. 51, 938 S.W.2d 806 (1997).

A capital murder case involving imposition of a life sentence without the possibility of parole was remanded where the court was precluded from a full review of what transpired at trial due to an incomplete record. *McGehee v. State*, 328 Ark. 404, 943 S.W.2d 585 (1997).

The language of subsection (h) of this rule does not mandate plain-error review, and an objection by counsel is required to preserve an issue for review. *Green v. State*, 330 Ark. 458, 956 S.W.2d 849 (1997).

The Supreme Court has an affirmative duty to review the record in all death-penalty cases for prejudicial error. *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999).

When a defendant has received a sentence of life imprisonment, it will continue to be his responsibility to bring forward an appeal; however, when the death penalty has been imposed, the Supreme Court is required to perform an automatic review of the record for egregious errors such as those that fall within the exception to the plain-error rule. *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999).

An automatic review of the entire record in all death-penalty cases is useful when evaluating whether a defendant's waiver of his right to appeal was proper under *Franz v. State*, 296 Ark. 181, 754 S.W.2d 839 (1988). Such a review would also enable the court to determine (1) whether any errors raised in the trial court are prejudicial to the defendant, in accordance with Ark. Code Ann. § 16-91-113(a) (1987) and this rule; (2) whether

any plain errors covered by the exceptions outlined in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980), have occurred; and (3) whether other fundamental safeguards were followed. *State v. Smith*, 340 Ark. 257, 12 S.W.3d 629 (2000).

Defendant's point of error that the trial court should have excused a juror for cause was not preserved for appellate review because defense counsel essentially agreed with the trial court's ruling and conceded that there were no grounds to excuse the juror for cause; thus, there was no reversible error reviewable under subsection (h) of this rule or § 16-91-113(a). *Roberts v. State*, 352 Ark. 489, 102 S.W.3d 482 (2003).

Where defendant was sentenced to life in prison and the record on appeal did not contain a complete transcript of jury selection and voir dire or opening and closing statements, the reviewing court was unable to review all errors prejudicial to defendant pursuant to § 16-91-113(a), as required under subsection (h) of this rule. *Romes v. State*, 355 Ark. 497, 139 S.W.3d 519 (2003).

Because a life sentence was imposed in defendant's capital murder case, the record was reviewed pursuant to subsection (h) of this rule for adverse rulings objected to by defendant but not argued on appeal; no such reversible errors were found. *O'Neal v. State*, 356 Ark. 674, 158 S.W.3d 175 (2004).

Supreme Court of Arkansas upheld defendant's conviction for the capital murder of an 87-year-old woman who was found shot to death in her yard where defendant confessed to the crime and the record of the guilt phase was reviewed for any prejudicial error under subsection (h) of this rule, § 16-91-113(a), and Ark. R. App. P. — Crim. 10, and none was found. *Anderson v. State*, 357 Ark. 180, 163 S.W.3d 333 (2004).

In its review for error, the Court concluded that it was the entered judgment and commitment order that controlled defendant's sentence upon his conviction; thus, defendant's sentence was without parole as reflected in the judgment and commitment order rather than in the trial court's sentence of life imprisonment plus fifteen years. *Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005).

Defendant's sufficiency of the evidence challenge was not preserved for appeal because a clear and specific motion for a directed verdict was not made to the trial court, as required by Ark. R. Crim. P. 33.1, and because subsection (h) of this rule did not mandate review of a case involving a sentence of life imprisonment without parole when the directed verdict motion was not properly made. *Elkins v. State*, 374 Ark. 399, 288 S.W.3d 570 (2008).

Where defendant was convicted for capital murder and sentenced to life in prison without parole plus ten years, the Supreme Court

of Arkansas complied with subsection (h) of this rule by examining record for all objections, motions, and requests made by either party that were decided adversely to defendant. No prejudicial error was found. *Page v. State*, 2009 Ark. 112, 313 S.W.3d 7 (2009).

Record has been reviewed in accordance with subsection (i) of this rule, and no reversible error had been found. *White v. State*, 2009 Ark. 374, 326 S.W.3d 421 (2009).

Record was reviewed for other reversible error as required by subsection (i) of this rule and none was found. *Adams v. State*, 2009 Ark. 375, 326 S.W.3d 764 (2009).

Scope of Review.

This rule did not require the appellate court to review an argument not specifically made to the circuit court or to research a novel argument for an appellant who cited no apposite authority. *Hollis v. State*, 346 Ark. 175, 55 S.W.3d 756 (2001).

Examination of the record has been made in accordance with subsection (h) of this rule and Ark. R. App. P. Crim. 14, and it has been determined that there were no rulings adverse to defendant which constituted prejudicial error. *Randle v. State*, 372 Ark. 246, 273 S.W.3d 482 (2008).

Sequence of Record.

There may be parts of the record that are not pertinent to the appeal and need not be abstracted, such as the voir dire examination of each juror or pretrial rulings or testimony not relevant on appeal; if, however, objections were made during such parts of the proceeding, those objections should be abstracted in sequence as they appear in the record, and if counsel for the appellant deems it best not to abstract the record exactly according to the sequence of its numbered pages, appropriate explanations should be inserted for the benefit of the attorney general and the court. *Curry v. State*, 270 Ark. 570, 605 S.W.2d 748 (1980) (decision under prior rule).

Special Counsel.

It was the intent of the Arkansas Supreme Court that the counsel appointed pursuant to the court's decision in *State v. Robbins*, 339 Ark. 379, 5 S.W.3d 51 (1999) would not serve as a representative of a party but rather would assist the court in its review, because when that counsel represents one of the parties, a conflict of interest exists. *State v. Robbins*, 340 Ark. 255, 9 S.W.3d 500 (2000).

Sufficiency of Transcript.

The transcript of a criminal trial need not be perfectly accurate, rather it is sufficient to meet the requirements of the law if it is not so inadequately fair as to prevent the defendant from meeting the requirements of this rule and deny him his right of appeal under § 16-91-101, and he bears the burden of demon-

strating the inadequacy. *Butler v. State*, 264 Ark. 243, 570 S.W.2d 272 (1978) (decision under prior rule).

The burden is on the appellant to bring up a sufficient record to demonstrate error. *Lukach v. State*, 310 Ark. 38, 834 S.W.2d 642 (1992) (decision under prior rule).

In a criminal case where a life sentence without parole was imposed, the defendant was entitled to a new trial where the trial transcript was inadequate and attempts to reconstruct or settle the record had failed. *Jacobs v. State*, 327 Ark. 498, 939 S.W.2d 824 (1997).

Timely Filing of Briefs.

Counsel has the burden of proving, by a preponderance of the evidence, that he has meritorious reasons for not filing the appellant's brief when due as prescribed by this rule, or he will be held in contempt. In re *Jeremiah*, 308 Ark. 320, 822 S.W.2d 392 (1992) (decision under prior rule).

An extension of time to file a pro se brief in an *Anders* case, or permission to file the pro se brief belatedly, would not be granted absent a showing that the 30 days allowed by the rule was not sufficient. *Langford v. State*, 317 Ark. 429, 877 S.W.2d 593 (1994).

Once the appellee has filed its brief, it is too late for the appellant to file a motion to amend the appellant's brief. *Jones v. McCool*, 318 Ark. 688, 886 S.W.2d 633 (1994), criticized *Daffron v. State*, 325 Ark. 411, 926 S.W.2d 662 (1996).

Withdrawal of Counsel.

The attorney representing an accused at trial has the duty to do certain things if he intends to withdraw from the case; part of the duties of such attorney is to obtain permission from the trial court to withdraw from the case and such request to withdraw should contain a statement of the reasons therefor; also the accused should receive a copy of the request for withdrawal and, if granted, a copy of the order allowing the withdrawal. *Finnie v. State*, 265 Ark. 941, 582 S.W.2d 19 (1979); *Chandler v. State*, 297 Ark. 432, 762 S.W.2d 796 (1989) (preceding decisions under prior rule).

Where the defendant's trial counsel filed a notice of appeal, but then failed to file the transcript and the record with the appellate court, the defendant's motion for a belated appeal was properly granted by the trial court because the trial attorney had apparently abandoned his client and left him without an appeal being perfected, even though no good reason was shown by the trial counsel for his failure to perfect the appeal. *Osbourne v. State*, 276 Ark. 479, 637 S.W.2d 535 (1982) (decision under prior rule).

In view of the fact that the present attorney did not follow the procedure prescribed for

withdrawal, he would still be considered the attorney of record and would be held responsible for the duties imposed upon him by law, and where the attorney made a mistake in not timely filing an appeal, his client's motion for a belated appeal would be granted. *Ellis v. State*, 276 Ark. 560, 637 S.W.2d 588 (1982) (decision under prior rule).

The Supreme Court will not grant a motion for extension of time in an appeal filed pursuant to former subsection (h) (now (j)) of this rule without a clear showing that the 30 days to respond provided for in the rule is inadequate. *Reed v. State*, 278 Ark. 404, 646 S.W.2d 6 (1983) (decision under prior rule).

Where the evidence showed that the defendant wrote to his attorney several times within the 30-day period during which an appeal could have been initiated asking his attorney to appeal from the decision revoking his suspended sentence, but the attorney never perfected the appeal nor sought permission from the trial court to withdraw from the case, the defendant's pro se motion for a belated appeal would be granted, and since his attorney remained the attorney of record, the attorney would be held responsible for the duties on appeal imposed upon him by law. *Blakely v. State*, 279 Ark. 141, 649 S.W.2d 187 (1983) (decision under prior rule).

Where retained counsel filed appeal but did not pursue appeal despite defendant's wish that he do so, he remained attorney of record in light of his failure to follow the procedure prescribed under former subsection (h) (now (j)) of this rule for withdrawal from a case; accordingly, motion by defendant to relieve such attorney as counsel would be denied and attorney would be required either to petition court to leave to withdraw or to file motion requesting permission to file record on appeal. *Nelson v. State*, 279 Ark. 362, 651 S.W.2d 98 (1983) (decision under prior rule).

Where defendant's counsel filed a motion to withdraw and defendant was notified of his right to a belated appeal but he failed to request one, defendant was not entitled to postconviction relief on the basis of the claim that his counsel failed to appeal when requested to do so. *Lomax v. State*, 285 Ark. 440, 688 S.W.2d 283 (1985) (decision under prior rule).

In order to file a "no merit" brief, petitioner's attorney must file a motion for permission to withdraw as counsel and further comply with former subsection (h) (now (j)) of this rule. Petitioner will then be given 30 days in which to file a pro se supplemental brief. *Blue v. State*, 287 Ark. 345, 698 S.W.2d 302 (1985) (decision under prior rule).

Where the counsel submitted a brief, but it did not contain a list of all objections, motions and requests made by appellant and denied by the court or a statement as to the reason

the points would not arguably support an appeal, he was instructed to submit a brief in compliance with former subsection (h) (now (j)) of this rule within 30 days. *Campbell v. State*, 288 Ark. 309, 705 S.W.2d 422 (1986) (decision under prior rule).

If counsel feels that the appeal has no merit, he or she is obligated to either obtain permission from the trial court to withdraw before the notice of appeal is filed or file a motion to withdraw in the Supreme Court after the notice of appeal is filed. *Gay v. State*, 288 Ark. 589, 707 S.W.2d 320 (1986) (decision under prior rule).

The principles that attorneys are required to file a brief setting out all issues which might support an appeal and explain why those issues have no merit prior to being relieved as counsel was held in *Pennsylvania v. Finley*, 481 U.S. 551, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) not to extend to collateral postconviction petitions in federal proceedings; however, "*Finley*" does not affect the Arkansas rules and if appointed counsel determines the appeal is without merit, he or she must state the reasons therefor. *Mills v. State*, 293 Ark. 312, 737 S.W.2d 460 (1987) (decision under prior rule).

Where counsel was never notified that the appellant desired to follow through with an appeal and the appellant was not indigent and therefore had made no showing that he was entitled to an appeal at public expense, there was no obligation on the part of counsel to comply with the provisions of subsection (h) of this rule. *Bogan v. State*, 293 Ark. 370, 738 S.W.2d 94 (1987) (decision under prior rule).

Where it was arguable that affirming a conviction wholly on the strength of a brief drafted by the state would constitute a denial of the due process right to effective assistance of counsel, the appellate court directed that defendant's attorney comply with the requirements of subsection (h) of the former rule by filing a proper brief. *House v. State*, 20 Ark. App. 28, 722 S.W.2d 886 (1987) (decision under prior rule).

An attorney of record who fails to perfect an appeal must obtain permission to withdraw from the case or he will face a substantial risk of subsequently being held ineffective. *Plugge v. State*, 295 Ark. 513, 750 S.W.2d 52 (1988) (decision under prior rule).

A no-merit appeal brief written almost entirely by the state does not comport with the constitutional requirements of equal protection and due process or with the requirements of subsection (h) of the former rule. *Jones v. State*, 27 Ark. App. 24, 765 S.W.2d 15 (1989) (decision under prior rule).

Where counsel wanted to withdraw his representation and the petitioner concurred, until leave to withdraw was granted, counsel had an obligation to either (1) assure the

transcript was filed on time or (2) obtain another extension of time to file the transcript. *Huggins v. State*, 304 Ark. 505, 803 S.W.2d 544 (1991) (decision under prior rule).

Counsel for defendant in a criminal case who wished to withdraw should have addressed his original request for withdrawal to the supreme court, not the circuit court. *Huggins v. State*, 304 Ark. 505, 803 S.W.2d 544 (1991) (decision under prior rule).

Even if the trial court entered an order stating that the defendant had expressed the desire that counsel be discharged from the case, such an order would have no effect since it was filed after the notice of appeal, and under subsection (h) of the former rule, once a notice of appeal is filed, motions to be relieved as counsel must be addressed to the supreme court. *State v. Van Pelt*, 305 Ark. 125, 810 S.W.2d 27 (1991) (decision under prior rule).

Attorney was obligated under former subsection (h) (now (j)) of this rule to ask to be relieved with respect to that portion of the appeal which he contended was meritless and to support the motion with a brief referring to anything in the record that might arguably support the appeal, together with a list of all objections made by the defendant and overruled by the court and of all motions and requests made by the defendant and denied by the court, and accompanied by a statement as to the reason counsel considers the points thus raised would not arguably support an appeal. *Jones v. State*, 306 Ark. 632, 819 S.W.2d 683 (1991) (decision under prior rule).

The mere assertion by counsel that the appeal is without merit is insufficient. *Bigham v. State*, 36 Ark. App. 22, 820 S.W.2d 462 (1991) (decision under prior rule).

Where brief of appellant, convicted of capital murder, failed to meet the requirements of former Rule 9 (now Rule 4-2), and former subsections (f) and (h) of this rule, and was so inadequate that the appeal could not be decided, the state's second motion to order compliance with the rules was granted. *Jackson v. State*, 310 Ark. 379, 833 S.W.2d 376 (1992) (decision under prior rule).

Counsel's motion to withdraw was denied. *Ofochebe v. State*, 40 Ark. App. 92, 844 S.W.2d 373 (1992) (decision under prior rule).

A motion to be relieved as counsel after the filing of a notice of appeal must be submitted to the Supreme Court rather than to the trial court. *Reagan v. State*, 316 Ark. 511, 872 S.W.2d 396 (1994).

ARCrP 36.26 provides that trial counsel, whether retained or court appointed, shall continue to represent a convicted defendant throughout appeal, unless permitted by the trial court or the Supreme Court to withdraw; once the notice of appeal is filed with the circuit clerk, under subdivision (j)(1) of this rule, only the appellate court can relieve

counsel of the obligation to proceed with the appeal. *Franklin v. State*, 317 Ark. 42, 875 S.W.2d 836 (1994).

Once an attorney files a notice of appeal, he is required either to perfect the appeal by lodging the record in the appellate court or file a motion to withdraw in the appellate court within the time allowed for the timely lodging of the record; an attorney may not simply abandon the appeal. *Zucco v. State*, 318 Ark. 386, 885 S.W.2d 675 (1994).

Motion by counsel to withdraw on the grounds that client's appeal was without merit granted where the motion was accompanied by a full brief, appellant had a copy of his counsel's brief and was notified of his right to file a pro se brief within thirty days, and where the state concurred that counsel complied with subsection (j) of this rule. *Bealer v. State*, 49 Ark. App. 119, 897 S.W.2d 577 (1995).

Where an attorney apparently did not comply with the requirements of subdivision (j)(1) of this rule, his motion for withdrawal was denied. *Moses v. State*, 327 Ark. 420, 938 S.W.2d 233 (1997).

Before court would relieve counsel for criminal defendant from representation or appoint new counsel, because counsel claimed he lacked the financial resources to continue defendant's appeal, counsel would be required to present appropriate documentation, such as an affidavit of defendant's indigency and a statement supporting the reasons for his withdrawal. *James v. State*, 329 Ark. 58, 945 S.W.2d 941 (1997).

A brief submitted by the defendant's counsel in support of his motion to withdraw was insufficient where it discussed the sufficiency of the evidence, but did not discuss the denial of the defendant's motion to represent himself at trial or the denial of his motion for a continuance. *Dewberry v. State*, 341 Ark. 170, 15 S.W.3d 671 (2000).

Defense counsel complied with the requirements to withdraw as counsel of record where he asserted that his continued representation of the defendant created a conflict of interest arising from his representation of the defendant and members of the defendant's family in other pending civil and criminal lawsuits, that the defendant intended to call him as a witness at trial, and that he forwarded a copy of the motion to the defendant by first-class mail. *Gipson v. State*, 343 Ark. 44, 31 S.W.3d 834 (2000).

When two cases are considered simultaneously by the trial court, one of which results in an appeal that defense counsel considers to be meritorious, and one of which results in an appeal that defense counsel considers to be without merit, the purpose and spirit of subsection (j) of this rule is best served by requiring that the defendant be notified of her right

to file points on appeal with respect to the "no-merit" case, notwithstanding that defense counsel has not moved to withdraw from representation of the defendant in both cases. *Harris v. State*, 72 Ark. App. 227, 35 S.W.3d 819 (2000).

Attorney's motion to withdraw was denied where the motion was not filed jointly with another attorney who was licensed to practice law in Arkansas and the attorney failed to admit responsibility for not filing a transcript of his client's trial on time. *McKenzie v. State*, 354 Ark. 479, 125 S.W.3d 173 (2003).

Where defendant's counsel filed a notice of appeal, he was obligated to represent defendant until such time as he was permitted by the appellate court to withdraw pursuant to subdivision (j)(1) of this rule; because counsel failed to protect defendant's right to appeal, defendant was left without the effective appellate representation guaranteed to a convicted criminal defendant by the Sixth Amendment. *Holland v. State*, 358 Ark. 366, 190 S.W.3d 904 (2004).

Defendant's counsel was in contempt for representing defendant while not in good standing before the bar, for failing to perfect defendant's appeal, and for failing to file a motion under this rule seeking permission to withdraw from the appeal. *Edwards v. State*, 360 Ark. 90, 199 S.W.3d 684 (2004).

Counsel's brief to withdraw representation did not comply with subsection (j) of this rule where counsel's discussion of the motion to suppress a statement was not adequately addressed and counsel's abstract was insufficient; the record on appeal was limited to that which was properly abstracted and counsel's abstracting did not allow the appellate court to perform a review of the record to ensure that the right to counsel was fully protected. *Walton v. State*, 94 Ark. App. 229, 228 S.W.3d 524 (2006).

Although defendant's counsel's motion to withdraw complied with subsection (j) of this rule, the fact that counsel was unable to find authority supporting defendant's sentencing claim did not render the issue wholly frivolous; thus, his motion to withdraw was denied and a rebriefing was ordered. *Justus v. State*, 96 Ark. App. 29, 237 S.W.3d 528 (2006).

Inmate's counsel could properly file a "no-merit" brief seeking to withdraw in an appeal from the denial of the inmate's post-conviction motion. *McLeod v. State*, 2010 Ark. 95, — S.W.3d —, 2010 Ark. LEXIS 116 (Feb. 25, 2010).

Counsel's motion to withdraw as counsel was granted because counsel complied with the dictates of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and subsection (k) of this rule; an appeal in defendant's case would be wholly without

merit. *Holley v. State*, 2010 Ark. App. 47, — S.W.3d —, 2010 Ark. App. LEXIS 50 (2010).

Because a recording of a 911 tape was non-confrontational and was authenticated by the dispatcher, because evidence that defendant pulled a shotgun on the caller was relevant for sentencing purposes, and because defendant did not object to the alleged seating of a juror or show that counsel was ineffective in failing to object, there was no meritorious ground for appeal; therefore, counsel was allowed to withdraw pursuant to Anders and subsection (k) of this rule. *Doles v. State*, 2011 Ark. App. 476, — S.W.3d —, 2011 Ark. App. LEXIS 497 (June 29, 2011).

Because the state presented proof that defendant inexcusably failed to pay restitution and fees and was found by the police to be in a state of extreme intoxication in violation of defendant's probation conditions, defendant's appeal was without merit; therefore, pursuant to subdivision (k)(1) of this rule, defendant's appellate counsel could withdraw. *Gregory v. State*, 2011 Ark. App. 724, — S.W.3d —, 2011 Ark. App. LEXIS 775 (Nov. 30, 2011).

Granting of counsel's motion to be relieved under subsection (k) of this rule was proper because defendant's appeal had no merit. Defendant had freely admitted in her testimony that she had been a longtime, heavy user of marijuana and that whatever marijuana was found in the vehicle in which she was a passenger belonged to her; additionally, the sustaining of a prosecutor's objection was appropriate because the reader of the transcript was not a "witness" at that point. *Payton v. State*, 2012 Ark. App. 37, — S.W.3d —, 2012 Ark. App. LEXIS 98 (Jan. 11, 2012).

Counsel's motion to withdraw was granted because there had been full compliance with subsection (k) of this rule; the evidence supporting the revocation of defendant's probation was overwhelming, and thus, even assuming that the trial court erred in admitting testimony, any error would be harmless and could not stand as the basis for a meritorious argument on appeal. *Jones v. State*, 2012 Ark. App. 69, — S.W.3d —, 2012 Ark. App. LEXIS 167 (Jan. 18, 2012).

Counsel's motion to withdraw during defendant's appeal of a judgment revoking his probation was granted because defendant's testimony, standing alone, constitutes sufficient evidence that he violated the terms and conditions of his probation. *Jones v. State*, 2012 Ark. App. 69, — S.W.3d —, 2012 Ark. App. LEXIS 167 (Jan. 18, 2012).

Cited: *Hughes v. State*, 249 Ark. 805, 461 S.W.2d 940 (1971); *Schuster v. State*, 261 Ark. 730, 551 S.W.2d 210 (1977); *Corning Bank v. Bank of Rector*, 265 Ark. 68, 576 S.W.2d 949 (1979); *Euton v. State*, 270 Ark. 121, 603 S.W.2d 468 (Ct. App. 1980); *Miller v. State*,

269 Ark. 341, 605 S.W.2d 430 (1980), cert. denied 450 U.S. 1035, 101 S. Ct. 1750, 68 L. Ed. 2d 232 (1981); *Earl v. State*, 272 Ark. 5, 612 S.W.2d 98 (1981); *Conley v. State*, 272 Ark. 33, 612 S.W.2d 722 (1981), questioned *Clay v. State*, 290 Ark. 54, 716 S.W.2d 751 (1986); *Sargent v. State*, 272 Ark. 336, 614 S.W.2d 503 (1981); *Jackson v. State*, 273 Ark. 107, 617 S.W.2d 13 (1981); *Derring v. State*, 273 Ark. 347, 619 S.W.2d 644 (1981); *Linder v. State*, 273 Ark. 470, 620 S.W.2d 944 (1981); *Thomerson v. State*, 274 Ark. 17, 621 S.W.2d 690 (1981), criticized *Mayfield v. State*, 293 Ark. 216, 736 S.W.2d 12 (1987); *Couch v. State*, 274 Ark. 29, 621 S.W.2d 694 (1981); *Singleton v. State*, 274 Ark. 126, 623 S.W.2d 180 (1981), cert. denied 456 U.S. 938, 102 S. Ct. 1996, 72 L. Ed. 2d 458 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982); *Coble v. State*, 274 Ark. 134, 624 S.W.2d 421 (1981); *Hayes v. State*, 274 Ark. 440, 625 S.W.2d 498 (1981); *Jones v. State*, 275 Ark. 12, 627 S.W.2d 6 (1982); *Hill v. State*, 275 Ark. 71, 628 S.W.2d 284 (1982), cert. denied 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982); *Ford v. State*, 276 Ark. 98, 633 S.W.2d 3, cert. denied 459 U.S. 1022, 103 S. Ct. 389, 74 L. Ed. 2d 519 (1982); *Cotton v. State*, 276 Ark. 282, 634 S.W.2d 127 (1982); *Surridge v. State*, 276 Ark. 596, 637 S.W.2d 597 (1982); *Wilson v. State*, 277 Ark. 43, 639 S.W.2d 45 (1982); *Hayes v. State*, 278 Ark. 211, 645 S.W.2d 662 (1983), cert. denied 464 U.S. 865, 104 S. Ct. 198, 78 L. Ed. 2d 173 (1983); *Abernathy v. State*, 278 Ark. 250, 644 S.W.2d 590 (1983); *Heffernan v. State*, 278 Ark. 325, 645 S.W.2d 666 (1983); *Fuller v. State*, 278 Ark. 450, 646 S.W.2d 700 (1983); *Smith v. State*, 279 Ark. 68, 648 S.W.2d 490 (1983); *Henderson v. State*, 279 Ark. 414, 652 S.W.2d 26 (1983), cert. denied 464 U.S. 1012, 104 S. Ct. 536 (1983); *Clines v. State*, 280 Ark. 77, 656 S.W.2d 684 (1983), cert. denied 465 U.S. 1051, 104 S. Ct. 1328, 79 L. Ed. 2d 723 (1984), cert. denied sub nom. 512 U.S. 1272, 115 S. Ct. 17, 129 L. Ed. 2d 916 (1994); *Fields v. State*, 280 Ark. 153, 655 S.W.2d 419 (1983); *Hogan v. State*, 280 Ark. 287, 657 S.W.2d 534 (1983); *Long v. State*, 280 Ark. 327, 657 S.W.2d 551 (1983); *Miller v. State*, 280 Ark. 551, 660 S.W.2d 163 (1983); *Spears v. State*, 280 Ark. 577, 660 S.W.2d 913 (1983); *Allen v. State*, 281 Ark. 1, 660 S.W.2d 922 (1983); *Hogan v. State*, 281 Ark. 250, 663 S.W.2d 726 (1984); *Orsini v. State*, 281 Ark. 348, 665 S.W.2d 245 (1984), cert. denied 469 U.S. 847, 105 S. Ct. 162, 83 L. Ed. 2d 98 (1984); *Williams v. State*, 281 Ark. 387, 663 S.W.2d 928 (1984); *Beaumont v. Robinson*, 282 Ark. 181, 668 S.W.2d 514 (1984); *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Pruett v. State*, 282 Ark. 304, 669 S.W.2d 186 (1984), cert. denied 469 U.S. 963, 105 S. Ct. 362, 83 L. Ed. 2d 298 (1984); *Cessor v. State*, 282 Ark.

330, 668 S.W.2d 525 (1984); Reed v. State, 282 Ark. 492, 669 S.W.2d 192 (1984); Smith v. State, 282 Ark. 535, 669 S.W.2d 201 (1984); Berna v. State, 282 Ark. 563, 670 S.W.2d 434 (1984), cert. denied 470 U.S. 1085, 105 S. Ct. 1847 (1985), questioned Goff v. State, 953 S.W.2d 38 (Ark. 1997); Linell v. State, 283 Ark. 162, 671 S.W.2d 741 (1984), cert. denied 470 U.S. 1062, 105 S. Ct. 1778, 84 L. Ed 2d 837 (1985); McDaniel v. State, 283 Ark. 352, 676 S.W.2d 732 (1984); Webster v. State, 284 Ark. 206, 680 S.W.2d 906 (1984); Penn v. State, 284 Ark. 234, 681 S.W.2d 307 (1984); Fairchild v. State, 284 Ark. 289, 681 S.W.2d 380 (1984), cert. denied 471 U.S. 1111, 105 S. Ct. 2346 (1985); Henderson v. State, 284 Ark. 493, 684 S.W.2d 231 (1985); Maxwell v. State, 284 Ark. 501, 683 S.W.2d 908 (1985); Sherron v. State, 285 Ark. 8, 684 S.W.2d 247 (1985); Mayer v. State, 285 Ark. 73, 685 S.W.2d 143 (1985); Dudley v. State, 285 Ark. 160, 685 S.W.2d 170 (1985); Mason v. State, 285 Ark. 479, 688 S.W.2d 299 (1985); Hall v. State, 286 Ark. 52, 689 S.W.2d 524 (1985); Clawitter v. Lockhart, 286 Ark. 131, 689 S.W.2d 558 (1985); Hoback v. State, 286 Ark. 153, 689 S.W.2d 569 (1985); Richard v. State, 286 Ark. 410, 691 S.W.2d 872 (1985); Sims v. State, 286 Ark. 476, 695 S.W.2d 376 (1985); Williams v. State, 286 Ark. 492, 696 S.W.2d 307 (1985); Burnett v. State, 287 Ark. 158, 697 S.W.2d 95 (1985), overruled Midgett v. State, 292 Ark. 278, 729 S.W.2d 410 (1987); Snell v. State, 287 Ark. 264, 698 S.W.2d 289 (1985); Novak v. State, 287 Ark. 271, 698 S.W.2d 499 (1985); Zones v. State, 287 Ark. 483, 702 S.W.2d 1 (1985); Podhorn v. Paragon Group, 795 F.2d 658 (8th Cir. 1986); Orr v. State, 288 Ark. 118, 703 S.W.2d 438 (1986); Robbins v. State, 288 Ark. 311, 705 S.W.2d 6 (1986); Futch v. State, 288 Ark. 323, 705 S.W.2d 11 (1986); Williams v. State, 288 Ark. 444, 705 S.W.2d 888 (1986); Williams v. State, 289 Ark. 69, 709 S.W.2d 80 (1986); Hatley v. State, 289 Ark. 130, 709 S.W.2d 812 (1986); Watson v. State, 289 Ark. 138, 709 S.W.2d 817 (1986); Hill v. State, 289 Ark. 387, 713 S.W.2d 233 (1986), cert. denied 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed 2d 182 (1987); Baker v. State, 289 Ark. 430, 711 S.W.2d 816 (1986); Hughes v. State, 289 Ark. 522, 712 S.W.2d 308 (1986); Dix v. State, 290 Ark. 28, 715 S.W.2d 879 (1986); Bennett v. State, 290 Ark. 47, 716 S.W.2d 755 (1986), rev'd en banc 485 U.S. 395, 108 S. Ct. 1204 (1988); Watson v. State, 290 Ark. 484, 720 S.W.2d 310 (1986); Conley v. State, 20 Ark. App. 56, 723 S.W.2d 841 (1987); Henderson v. State, 291 Ark. 138, 722 S.W.2d 842 (1987), cert. denied 493 U.S. 896, 110 S. Ct. 247, 107 L. Ed. 2d 197 (1989); Holloway v. Norris, 291 Ark. 632, 727 S.W.2d 381 (1987); Philyaw v. State, 292 Ark. 24, 728 S.W.2d 150 (1987), questioned Thomas v. State, 954 S.W.2d 255 (1997), overruled Thomas v. State, 911 S.W.2d

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State, 321 Ark. 555, 905 S.W.2d 835 (1995), cert. denied 517 U.S. 1108, 116 S. Ct. 1329 (1996); Smith v. State, 321 Ark. 580, 906 S.W.2d 302 (1995); Mills v. State, 321 Ark. 621, 906 S.W.2d 674 (1995); Reams v. State, 322 Ark. 336, 909 S.W.2d 324 (1995), cert. denied 519 U.S. 832, 117 S. Ct. 100 (1996); Bowen v. State, 322 Ark. 483, 911 S.W.2d 555 (1995), cert. denied 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996); Caldwell v. State, 322 Ark. 543, 910 S.W.2d 667 (1995), cert. denied 517 U.S. 1124, 116 S. Ct. 1361 (1996); Willett v. State, 322 Ark. 613, 911 S.W.2d 937 (1995), questioned Robbins v. State, 356 Ark. 225, 149 S.W.3d 871 (2004), criticized Jones v. State, 329 Ark. 62, 947 S.W.2d 339 (1997); Mills v. State, 322 Ark. 647, 910 S.W.2d 682 (1995); Alexander v. State, 55 Ark. App. 148, 934 S.W.2d 927 (1996); Pike v. State, 323 Ark. 56, 912 S.W.2d 431 (1996); Burns v. State, 323

Ark. 206, 913 S.W.2d 789 (1996); Mosley v. State, 323 Ark. 244, 914 S.W.2d 731 (1996); Frazier v. State, 323 Ark. 350, 915 S.W.2d 691 (1996); Misskelley v. State, 323 Ark. 449, 915 S.W.2d 702 (1996); Jones v. State, 323 Ark. 496, 915 S.W.2d 722 (1996); Hogue v. State, 323 Ark. 515, 915 S.W.2d 276 (1996); Nance v. State, 323 Ark. 583, 918 S.W.2d 114 (1996), cert. denied 519 U.S. 847, 117 S. Ct. 134, 136 L. Ed. 2d 83 (1996); Jones v. State, 323 Ark. 655, 916 S.W.2d 736 (1996); Clay v. State, 324 Ark. 9, 919 S.W.2d 190 (1996); Wilkins v. State, 324 Ark. 60, 918 S.W.2d 702 (1996); Cooper v. State, 324 Ark. 135, 919 S.W.2d 205 (1996), overruled MacKintrush v. State, 978 S.W.2d 293 (Ark. 1998); Bohanan v. State, 324 Ark. 158, 919 S.W.2d 198 (1996); Kemp v. State, 324 Ark. 178, 919 S.W.2d 943 (1996), cert. denied 519 U.S. 982, 117 S. Ct. 436 (1996), criticized Jones v. State, 947 S.W.2d 339 (Ark. 1997); Bell v. State, 324 Ark. 258, 920 S.W.2d 821 (1996); Weaver v. State, 324 Ark. 290, 920 S.W.2d 491 (1996); Prowell v. State, 324 Ark. 335, 921 S.W.2d 585 (1996), overruled State v. Bell, 948 S.W.2d 557 (1997); Kennedy v. State, 325 Ark. 3, 923 S.W.2d 274 (1996); Slocum v. State, 325 Ark. 38, 924 S.W.2d 237 (1996); Abernathy v. State, 325 Ark. 61, 925 S.W.2d 380 (1996); Key v. State, 325 Ark. 73, 923 S.W.2d 865 (1996); Davis v. State, 325 Ark. 96, 925 S.W.2d 768 (1996); Owens v. State, 325 Ark. 110, 926 S.W.2d 650 (1996); McCoy v. State, 325 Ark. 155, 925 S.W.2d 391 (1996); Choate v. State, 325 Ark. 251, 925 S.W.2d 409 (1996); Hill v. State, 325 Ark. 419, 931 S.W.2d 64 (1996); Williams v. State, 325 Ark. 432, 930 S.W.2d 297 (1996); Ferrell v. State, 325 Ark. 455, 929 S.W.2d 697 (1996); Carter v. State, 325 Ark. 477, 929 S.W.2d 690 (1996); Brown v. State, 325 Ark. 504, 929 S.W.2d 146 (1996), overruled in part McCoy v. State, 69 S.W.3d 430 (Ark. 2002); Wooten v. State, 325 Ark. 510, 931 S.W.2d 408 (1996), cert. denied 519 U.S. 1125, 117 S. Ct. 979 (1997); Isbell v. State, 326 Ark. 17, 931 S.W.2d 74 (1996); Danzie v. State, 326 Ark. 34, 930 S.W.2d 310 (1996); Cleveland v. State, 326 Ark. 46, 930 S.W.2d 316 (1996); Peeler v. State, 326 Ark. 423, 932 S.W.2d 312 (1996); Lee v. State, 326 Ark. 529, 932 S.W.2d 756 (1996); Rayford v. State, 326 Ark. 656, 934 S.W.2d 496 (1996); Whitefield v. State, 326 Ark. 762, 934 S.W.2d 484 (1996); Echols v. State, 326 Ark. 917, 936 S.W.2d 509 (1996), cert. denied 520 U.S. 1244, 117 S. Ct. 1853, 137 L. Ed. 2d 1055 (1997); Landrum v. State, 326 Ark. 994, 936 S.W.2d 505 (1996); Bradley v. State, 327 Ark. 6, 937 S.W.2d 628 (1997); Matthews v. State, 327 Ark. 70, 938 S.W.2d 545 (1997); Gray v. State, 327 Ark. 113, 937 S.W.2d 639 (1997); Bragg v. State, 327 Ark. 123, 937 S.W.2d 646 (1997); In re Atkinson, 327 Ark. 193, 936 S.W.2d 747 (1997); Ricks v. State, 327 Ark. 513, 940 S.W.2d 422 (1997);

Wright v. State, 327 Ark. 558, 940 S.W.2d 432 (1997); Camargo v. State, 327 Ark. 631, 940 S.W.2d 464 (1997), criticized Jones v. State, 329 Ark. 62, 947 S.W.2d 339 (1997); Humphrey v. State, 327 Ark. 753, 940 S.W.2d 860 (1997); Webb v. State, 328 Ark. 12, 941 S.W.2d 417 (1997); Bowden v. State, 328 Ark. 15, 940 S.W.2d 494 (1997); Jefferson v. State, 328 Ark. 23, 941 S.W.2d 404 (1997); Stephens v. State, 328 Ark. 81, 941 S.W.2d 411 (1997); Miller v. State, 328 Ark. 121, 942 S.W.2d 825 (1997); Jones v. State, 328 Ark. 307, 942 S.W.2d 851 (1997); Landrum v. State, 328 Ark. 361, 944 S.W.2d 101 (1997); Martin v. State, 328 Ark. 420, 944 S.W.2d 512 (1997), overruled State v. Bell, 329 Ark. 422, 948 S.W.2d 557 (1997); Spann v. State, 328 Ark. 509, 944 S.W.2d 537 (1997); Caple v. State, 328 Ark. 680, 945 S.W.2d 363 (1997); Hood v. State, 329 Ark. 21, 947 S.W.2d 328 (1997); Rankin v. State, 329 Ark. 379, 948 S.W.2d 397 (1997); Goff v. State, 329 Ark. 513, 953 S.W.2d 38 (1997); Reyes v. State, 329 Ark. 539, 954 S.W.2d 199 (1997); Roseby v. State, 329 Ark. 554, 953 S.W.2d 32 (1997), overruled MacKintrush v. State, 334 Ark. 390, 978 S.W.2d 293 (1998); Nahlen v. State, 330 Ark. 1, 953 S.W.2d 877 (1997); Wofford v. State, 330 Ark. 8, 952 S.W.2d 646 (1997); Smith v. State, 330 Ark. 50, 953 S.W.2d 870 (1997); Davis v. State, 330 Ark. 76, 953 S.W.2d 559 (1997); Lammers v. State, 330 Ark. 324, 955 S.W.2d 489 (1997), overruled MacKintrush v. State, 978 S.W.2d 293 (Ark. 1998); Davis v. State, 330 Ark. 501, 938 S.W.2d 806 (1997); Moore v. State, 330 Ark. 514, 954 S.W.2d 932 (1997); Davis v. State, 330 Ark. 610, 955 S.W.2d 705 (1997); Ayers v. State, 332 Ark. 370, 960 S.W.2d 453 (1998); Marts v. State, 332 Ark. 628, 968 S.W.2d 41 (1998); Matthews v. State, 332 Ark. 661, 966 S.W.2d 888 (1998); Parker v. State, 333 Ark. 137, 968 S.W.2d 592 (1998); King v. State, 62 Ark. App. 112, 969 S.W.2d 199 (1998); Greene v. State, 335 Ark. 1, 977 S.W.2d 192 (1998); Bell v. State, 334 Ark. 285, 973 S.W.2d 806 (1998); Conner v. State, 334 Ark. 457, 982 S.W.2d 655 (1998); Hussey v. State, 332 Ark. 552, 966 S.W.2d 261 (1998); Burkhalter v. State, 330 Ark. 684, 956 S.W.2d 171 (1997); Landreth v. State, 331 Ark. 12, 960 S.W.2d 434 (1998); Noel v. State, 331 Ark. 79, 960 S.W.2d 439 (1998); Williams v. State, 331 Ark. 263, 962 S.W.2d 329 (1998); Hernandez v. State, 331 Ark. 301, 962 S.W.2d 756 (1998); Hill v. State, 331 Ark. 312, 962 S.W.2d 762 (1998), cert. denied 525 U.S. 860, 119 S. Ct. 145, 142 L. Ed. 2d 118 (1998); Regalado v. State, 331 Ark. 326, 961 S.W.2d 739 (1998); Sanford v. State, 331 Ark. 334, 962 S.W.2d 335 (1998); Harris v. State, 331 Ark. 353, 961 S.W.2d 737 (1998); Lloyd v. State, 332 Ark. 1, 962 S.W.2d 365 (1998); Wilson v. State, 332 Ark. 7, 962 S.W.2d 805 (1998); Simpson v. State, 338 Ark. 511, 999 S.W.2d 181 (1999);

Windsor v. State, 338 Ark. 649, 1 S.W.3d 20 (1999); Dansby v. State, 338 Ark. 697, 1 S.W.3d 403 (1999); Rankin v. State, 338 Ark. 723, 1 S.W.3d 14 (1999); Hammon v. State, 338 Ark. 733, 2 S.W.3d 50 (1999); Sweeney v. State, 69 Ark. App. 7, 9 S.W.3d 529 (2000); McChristian v. State, 70 Ark. App. 514, 20 S.W.3d 461 (2000); Whitfield v. State, 346 Ark. 43, 56 S.W.3d 357 (2001); Birmingham v. State, 346 Ark. 78, 57 S.W.3d 118 (2001); Bunch v. State, 346 Ark. 33, 57 S.W.3d 124 (2001); Jenkins v. State, 348 Ark. 686, 75 S.W.3d 180 (2002); General v. State, 79 Ark. App. 219, 86 S.W.3d 15 (2002); Climer v. State, 80 Ark. App. 281, 95 S.W.3d 11 (2003); Benavidez v. State, 352 Ark. 374, 101 S.W.3d 242 (2003); Rogers v. State, 353 Ark. 359, 107 S.W.3d 166 (2003); Hoover v. State, 353 Ark. 424, 108 S.W.3d 618 (2003); Robinson v. State, 353 Ark. 372, 108 S.W.3d 622 (2003); Romes v. State, 356 Ark. 26, 144 S.W.3d 750 (2004); Ellison v. State, 354 Ark. 340, 123 S.W.3d 874 (2003); Winston v. State, 355 Ark. 11, 131 S.W.3d 333 (2003); Townsend v. State, 355 Ark. 248, 134 S.W.3d 545 (2003); Lewis v. State, 84 Ark. App. 327, 139 S.W.3d 810 (2004); Nelson v. State, 84 Ark. App. 373, 141 S.W.3d 900 (2004); Coggin v. State, 356 Ark. 424, 156 S.W.3d 712 (2004); Ratchford v. State, 357 Ark. 27, 159 S.W.3d 304 (2004); Mosley v. State, 87 Ark. App. 127, 189 S.W.3d 456 (2004); Ashley v. State, 358 Ark. 414, 191 S.W.3d 520 (2004); Johnson v. State, 358 Ark. 460, 193 S.W.3d 260 (2004); Moore v. State, 362 Ark. 70, 207 S.W.3d 493 (2005); Flowers v. State, 362 Ark. 193, 208 S.W.3d 113 (2005); Hewitt v. State, 362 Ark. 369, 208 S.W.3d 185 (2005); Wright v. State, 92 Ark. App. 369, 214 S.W.3d 280 (2005); Williams v. State, 363 Ark. 395, 214 S.W.3d 829 (2005); Swift v. State, 363 Ark. 496, 215 S.W.3d 619 (2005); Tillman v. State, 364 Ark. 143, 217 S.W.3d 773 (2005); Wilson v. State, 364 Ark. 550, 222 S.W.3d 171 (2006); Holland v. State, 365 Ark. 55, 225 S.W.3d 353 (2006); Coulter v. State, 365 Ark. 262, 227 S.W.3d 904 (2006); Carey v. State, 365 Ark. 379, 230 S.W.3d 553 (2006); Gillard v. State, 366 Ark. 217, 234 S.W.3d 310 (2006); Weston v. State, 366 Ark. 265, 234 S.W.3d 848 (2006); Whitt v. State, 365 Ark. 580, 232 S.W.3d 459 (2006); Parmley v. State, — Ark. —, — S.W.3d —, 2006 Ark. LEXIS 218 (Mar. 23, 2006); McEwing v. State, 366 Ark. 456, 237 S.W.3d 43 (2006); Bedford v. State, 96 Ark. App. 38, 237 S.W.3d 516 (2006); Dickinson v. State, 367 Ark. 102, 238 S.W.3d 125 (2006); Winston v. State, 368 Ark. 105, 243 S.W.3d 304 (2006); Springs v. State, 368 Ark. 256, 244 S.W.3d 683 (2006); Ivers v. Ark. Dep't of Human Servs., 98 Ark. App. 57, 250 S.W.3d 279 (2007); Thomas v. State, 370 Ark. 70, 257 S.W.3d 92 (2007), rehearing denied — Ark. —, — S.W.3d —, 2007 Ark. LEXIS 397 (June 21, 2007), cert. denied 552 U.S. 1025, 128 S. Ct. 620, 169 L. Ed. 2d 399 (2007); Harrison v. State, 371 Ark. 652, 269 S.W.3d 321 (2007); Jefferson v. State, 372 Ark. 307, 276 S.W.3d 214 (2008); Robinson v. State, 373 Ark. 305, 283 S.W.3d 558 (2008); Bienemy v. State, 374 Ark. 232, 287 S.W.3d 551 (2008); Bush v. State, 374 Ark. 506, 288 S.W.3d 658 (2008); Marks v. State, 375 Ark. 265, 289 S.W.3d 923 (2008); Wallace v. State, 2009 Ark. 90, 302 S.W.3d 580 (2009); Osburn v. State, 2009 Ark. 390, 326 S.W.3d 771 (2009); Foster v. State, 2009 Ark. 454, — S.W.3d —, 2009 Ark. LEXIS 625 (2009); Lawshea v. State, 2009 Ark. 600, 357 S.W.3d 901 (2009); Williams v. State, 2009 Ark. App. 525, 334 S.W.3d 873 (2009); Collier v. Ark. Dep't of Human Servs., 2009 Ark. App. 565, — S.W.3d —, 2009 Ark. App. LEXIS 744 (2009); Hickey v. State, 2010 Ark. 109, — S.W.3d —, 2010 Ark. LEXIS 130 (Mar. 4, 2010); Banks v. State, 2010 Ark. 108, 366 S.W.3d 341 (2010); Lacy v. State, 2010 Ark. 388, — S.W.3d —, 2010 Ark. LEXIS 484 (Oct. 21, 2010); Taylor v. State, 2011 Ark. 10, — S.W.3d —, 2011 Ark. LEXIS 16 (Jan. 20, 2011); Dorsey v. State, 2011 Ark. App. 368, — S.W.3d —, 2011 Ark. App. LEXIS 395 (May 18, 2011); McPherson v. State, 2012 Ark. App. 50, — S.W.3d —, 2012 Ark. App. LEXIS 104 (Jan. 11, 2012); Webb v. State, 2012 Ark. 64, — S.W.3d —, 2012 Ark. LEXIS 81 (Feb. 16, 2012); Carruth v. State, 2012 Ark. App. 305, — S.W.3d —, 2012 Ark. App. LEXIS 431 (May 2, 2012).

Rule 4-4. Filing and service of briefs in civil cases.

(a) *Appellant's brief.* In all civil cases the appellant shall, within 40 days of lodging the record, file eighteen copies of the appellant's brief with the Clerk and furnish evidence of service upon opposing counsel and the circuit court. Each copy of the appellant's brief shall contain every item required by Rule 4-2. Unemployment compensation cases appealed from the Arkansas Board of Review may be submitted to the Court of Appeals for decision as soon as the transcript is filed, unless the petition for review shows it is filed by an attorney, or notice of intent to file a brief for the appellant is filed with the Clerk prior to the filing of the transcript.

When a party has determined that confidential information is necessary and relevant to the appellate court's consideration of the case, redaction shall be done pursuant to Rule 4-1(d), and the party shall file nine redacted copies and nine unredacted copies of the appellant's brief. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(b) *Appellee's brief — Cross-appellant's brief.* The appellee shall file eighteen copies of the appellee's brief, and of any further abstract or addendum thought necessary, within 30 days after the appellant's brief is filed, and furnish evidence of service upon opposing counsel and the circuit court. If the appellee's brief has a supplemental abstract or addendum, it shall be compiled in accordance with Rule 4-2 and included in or with each copy of the brief. This rule shall apply to cross-appellants. If the cross-appellant is also the appellee, the two separate arguments may be contained in one brief, but each argument is limited to 30 pages.

When a party has determined that confidential information is necessary and relevant to the appellate court's consideration of the case, redaction shall be done pursuant to Rule 4-1(d), and the party shall file nine redacted copies and nine unredacted copies of the appellant's brief or cross-appellant's brief. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(c) *Reply brief — Cross-appellant's reply brief.* The appellant may file eighteen copies of a reply brief within fifteen days after the appellee's brief is filed and shall furnish evidence of service upon opposing counsel and the circuit court. This rule shall apply to the cross-appellant's reply brief except it must be filed within fifteen days after the cross-appellee's brief is filed.

When a party has determined that confidential information is necessary and relevant to the appellate court's consideration of the case, redaction shall be done pursuant to Rule 4-1(d), and the party shall file nine redacted copies and nine unredacted copies of the reply brief or cross-appellant's reply brief. The unredacted copies shall be filed under seal. The cover of each brief shall indicate clearly whether it is REDACTED or UNREDACTED.

(d) *Evidence of service.* Briefs tendered to the Clerk will not be filed unless evidence of service upon opposing counsel and the circuit court has been furnished to the Clerk. Such evidence may be in the form of a letter signed by counsel, naming the attorney or attorneys and the circuit court to whom copies of the brief have been mailed or delivered.

(e) *Submission.* The case shall be subject to call on the next Thursday (in the Supreme Court) or Wednesday (in the Court of Appeals) after the expiration of the time allowed for filing the reply brief of the appellant or the cross-appellant.

(f) *Continuances and extensions of time.*

(1) The Clerk or a deputy clerk may extend the due date of any brief by seven (7) calendar days upon oral request. The party requesting a Clerk's extension must confirm the extension by sending a letter immediately to the Clerk or the deputy clerk with a copy to all counsel of record and any pro se party. If such an extension is granted, no further extension shall be granted except by the Clerk for compliance with these Rules as provided in Rule 4-2(c) or by the Court upon a written motion showing good cause.

(2) Stipulations of counsel for continuances will not be recognized. Any request for an extension of time (except in (f)(1)) for the filing of any brief

must be made by a written motion, addressed to the Court, setting forth the facts supporting the request. Eight copies of the motion must be filed for Supreme Court cases and fourteen copies of the motion must be filed for Court of Appeals cases. Counsel who delay the filing of such a motion until it is too late for the brief to be filed if the motion is denied, do so at their own risk. (Amended June 30, 1997, effective September 1, 1997; amended May 31, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended June 7, 2001, effective July 1, 2001; amended September 20, 2001, effective for cases in which the record is lodged in the Supreme Court or Court of Appeals on or after September 1, 2001; amended January 22, 2004; amended February 10, 2005; amended October 9, 2008, effective January 1, 2009; amended December 11, 2008, effective January 1, 2009; amended October 29, 2009, effective January 1, 2010; amended June 3, 2010, effective July 1, 2010.)

CASE NOTES

ANALYSIS

Cross-appellant's brief.

Duty of attorney.

Notification by clerk.

Service of briefs.

When abstracts not required.

Cross-Appellant's Brief.

This rule obviously contemplates the arguments of appellee and cross-appellant as "separate arguments"; there is no authority to support the contention that a cross-appellant is relieved of presenting his argument as required by subsection (b) of this rule on the ground that he may have made an argument similar to appellee's argument. *Hall v. Freeman*, 327 Ark. 720, 942 S.W.2d 230 (1997).

Duty of Attorney.

It is the attorney's duty, not the court's, responsibility to make himself aware of the date on which an appellate brief is due. *Board of Trustees v. Stodola*, 326 Ark. 581, 931 S.W.2d 443 (1996).

Notification by Clerk.

The time periods are fixed by this rule for the filing of appellant's abstract and brief and appellee's brief and do not depend upon notification by the clerk of the court. *Lunsford v. Jones*, 11 Ark. App. 236, 669 S.W.2d 16 (1984) (decision under prior rule).

Motion to file belated brief granted where certain correspondence from the court, sent more than four months after the record was filed, was sent to the wrong address, even though this rule clearly states that an appellant's brief is due forty days after filing the record. *Baker v. State*, 326 Ark. 580, 931 S.W.2d 443 (1996).

It is not the responsibility of the Supreme Court Clerk to notify an attorney of the date on which his brief is due. *Board of Trustees v. Stodola*, 326 Ark. 1099, 934 S.W.2d 532 (1996).

Service of Briefs.

Although appellant apparently violated subsection (b) of this rule by failing to provide evidence of service upon the trial court, where no penalty is provided in the rules of the court for such an oversight, and the Clerk appeared to have been satisfied with the status of the brief when it was submitted, no prejudice resulted from the Clerk's permitting the brief to be filed. *Amalgamated Clothing & Textile Workers Int'l Union v. Earle Indus., Inc.*, 318 Ark. 524, 886 S.W.2d 594 (1994).

When Abstracts Not Required.

Claimants for unemployment benefits are not required to abstract the record under the former rule or former Rule 9 (now Rule 4-2) since petitions for review from decisions of the board of review are not treated the same as other civil cases under the appellate rules. *Hunter v. Daniels*, 2 Ark. App. 94, 616 S.W.2d 763 (1981) (decision under prior rule).

Cited: *Bank of Ozark v. Isaacs*, 263 Ark. 113, 563 S.W.2d 707 (1978); *Young v. State*, 23 Ark. App. 142, 743 S.W.2d 829 (1988); *Medlock v. Pledger*, 305 Ark. 610, 808 S.W.2d 785 (1991); *Medlock v. Pledger*, 306 Ark. 178, 809 S.W.2d 822 (1991); *Lupo v. Lineberger*, 311 Ark. 80, 841 S.W.2d 158 (1992) (preceding decisions under prior rule); *Guss v. State*, 327 Ark. 127, 936 S.W.2d 76 (1997); *O'Fallon v. O'Fallon*, 335 Ark. 229, 980 S.W.2d 246 (1998); *Lammey v. Eckel*, 60 Ark. App. 132, 968 S.W.2d 304 (1998).

Rule 4-5. Failure to file briefs in civil cases.

If the appellant's brief has not been filed in a civil case within the time allowed by Rule 4-4, the Court may dismiss the appeal and affirm the judgment or decree at cost to the appellant. When the appellee has failed to appear and file a brief, the Court may, when the case is called for submission, proceed and give judgment according to the requirements of the case.

CASE NOTES

Failure to File Abstract or Brief.

Where appellants gave notice of appeal and filed a two-volume record in the Supreme Court, but failed to submit an abstract or a brief, the decree of the trial court must be affirmed. *Holleman v. Fowler*, 248 Ark. 809, 454 S.W.2d 100 (1970) (decision under prior rule).

Cited: *Brown v. Maryland Cas. Co.*, 246 Ark. 1074, 442 S.W.2d 187 (1969); *International Harvester Corp. v. Hardin*, 264 Ark.

717, 574 S.W.2d 260 (1978); *Turner v. Bailey*, 271 Ark. 215, 607 S.W.2d 674 (1980); *Heritage v. State*, 28 Ark. App. 328, 775 S.W.2d 80 (1989); *Kennedy v. State*, 31 Ark. App. 196, 789 S.W.2d 746 (1990); *Wright v. Union Nat'l Bank*, 307 Ark. 301, 819 S.W.2d 698 (1991); *Mitchael v. State*, 309 Ark. 280, 828 S.W.2d 844 (1992) (preceding decision under prior rule); *Watanabe v. Webb*, 321 Ark. 569, 905 S.W.2d 70 (1995).

Rule 4-6. Amici curiae attorneys.

(a) *Briefs.* Amici Curiae attorneys may file briefs with the permission of the Court. The motion for permission should state the reasons why such a brief is thought to be necessary. If the amicus brief supports the appellant's position or is neutral, it is due at the same time as the appellant's brief; if it supports the appellee's position, it is due at the same time as the appellee's brief.

(b) *Oral arguments.* Amici Curiae attorneys will not be permitted to participate in oral arguments.

(c) *Petitions for rehearing.* Amici Curiae attorneys will not be permitted to file a petition for rehearing in their own names and may participate only by first securing permission of the regular attorneys or of the Court to join in the motion or brief.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Arkansas Law Survey, Greene, Civil Procedure, 7 U. Ark. Little Rock L.J. 167.

CASE NOTES

ANALYSIS

Participation on appeal.
Permission to file brief.
Timeliness.

Participation on Appeal.

Without an appearance by a party to an appeal in the form of a brief, participation by amicus curiae on behalf of that party is not appropriate; while this rule contemplates participation of amicus curiae in support of a party's position, subsection (b) of this rule is clear that amicus curiae shall not participate

in oral argument. *Grantors to Diaz Refinery PRP Comm. Site Trust v. Employers Nat'l Ins. Corp.*, 318 Ark. 171, 884 S.W.2d 591 (1994).

Permission to File Brief.

The Supreme Court will deny permission to file an amicus curiae brief when the purpose is nothing more than to make a political endorsement of the basic brief. *Ferguson v. Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983) (decision under prior rule).

Where it was obvious from the movant's motion for permission to file an amicus curiae brief that the movant anticipated discussing

nothing of legal significance and that the proposed amicus brief would be solely for the purpose of judicial lobbying, the supreme court denied the movant permission to file the brief. *Ferguson v. Brick*, 279 Ark. 168, 649 S.W.2d 397 (1983) (decision under prior rule).

Where it did not appear that the applicant was interested in any other case which would be effected by the decision but was interested only in the outcome of the case at bar, and the parties were represented by competent counsel, permission to file an amici curiae brief was denied. *Arkansas Dep't of Human Servs. v. Couch*, 36 Ark. App. 241, 821 S.W.2d 67 (1991) (decision under prior rule).

Timeliness.

Amici curiae counsel must file briefs in support of or in opposition to rehearing simultaneously with their motions for permission

to participate; if the motion and amicus brief support rehearing or are neutral, they must be filed within the time period that the petitioner's petition and brief are due; if the motion and amicus brief oppose rehearing, they must be filed within the time period that the respondent's petition and brief are due. *Yates v. Sturgis*, 312 Ark. 397, 849 S.W.2d 523 (1993) (decision under prior rule).

No additional time to file an amicus brief will be granted. Amicus briefs must accompany motions to participate. *Yates v. Sturgis*, 312 Ark. 397, 849 S.W.2d 523 (1993) (decision under prior rule).

Cited: *Curry v. Franklin Elec.*, 30 Ark. App. 139, 783 S.W.2d 76 (1990) (decision under prior rule); *Oates v. Oates*, 2010 Ark. App. 345, — S.W.3d —, 2010 Ark. App. LEXIS 352 (Apr. 21, 2010).

Rule 4-7. Briefs in Postconviction and Civil Appeals Where Appellant is Incarcerated and Proceeding Pro Se.

(a) *Applicability.* This rule shall govern *pro se* briefs filed by incarcerated persons in appeals of postconviction relief proceedings and civil appeals. Except for the provisions contained in this rule, briefs filed by *pro se* parties shall otherwise comply with the Rules of the Supreme Court and Court of Appeals.

(b) Style of briefs.

(1) *Briefs - Size - Paper - Type.* A *pro se* brief may be handwritten, typed or produced with computer or word processing equipment. A handwritten brief shall be clearly legible, shall not exceed thirty lines per page and fifteen words per line with left-hand and right-hand margins of at least one and one-half inches and upper and lower margins of at least two inches. Briefs shall be of uniform size on 8½" x 11" paper and firmly bound on the left hand margin by staples or other binding devices. If staples are used, they should be covered by tape. Typed briefs shall be double-spaced, except for quoted material, which may be single-spaced and indented. Footnote lines, except quotations, shall be double-spaced. Use of footnotes is not encouraged and should be used sparingly. Carbon copies are not acceptable, but copies produced by offset printing, positive photocopy, or other dry photo duplicating process which produces a clearly legible black-on-white reproduction may be used. Each page in the brief should be numbered sequentially with Page 1 being the first page of the abstract.

(2) *Length of argument.* Unless leave of the court is first obtained, the argument portion of a brief shall not exceed 30 double-spaced pages including the conclusion, if any. The appellant's reply brief shall not exceed 15 double-spaced pages and shall not include any supplemental abstract or addendum unless permitted by the court upon motion. Motions for an expansion of the page limit must set forth the reason or reasons for the request and must state that a good faith effort to comply with this rule has been made. The motion must specify the number of additional pages requested.

(3) *Affidavit.* If the *pro se* appellant received assistance in the preparation of the content of a brief, the brief shall also be accompanied by an affidavit under penalty of perjury that the appellant received assistance and from

whom. If the appellant has prepared it without the paid assistance of any other prison inmate, the affidavit shall so state.

(c) *Contents of briefs.*

(1) *Contents.* The contents of the brief shall be in the following order:

(A) *Abstract.* The abstract is a summary of the testimony of the witnesses and other statements of the judge and attorneys contained in the transcript that are important to the understanding of the issues raised in the argument portion of the brief. Pleadings, papers filed with the clerk, and documentary evidence should not be abstracted but should be included in the Addendum. It is the duty of the appellant to abstract such parts of the transcript, but only such parts, as are material to the points to be argued in the appellant's brief. The appellant in the abstract must summarize any testimony of witnesses, and discussions between the judge and any person, needed for an understanding of the issues. If parts of a prior trial or proceeding are important to the understanding of an issue, those parts of the transcript of that trial or proceeding must be included in the abstract. (E.g., an appellant arguing in a Rule 37.1 appeal that his attorney failed to make an objection at trial must abstract the part of the transcript where that occurred.) The appellee may prepare a supplemental abstract if material on which the appellee relies is not in the appellant's abstract.

(B) *Argument.* The appellant shall state each issue to be argued and then set out the argument in support of that issue. If an argument refers to a particular place in the record, the page number for that place in the record shall be provided. All citations of decisions of any court must state the name of the case and the book and page where the case may be found. Reference in the argument portion of the brief to material found in the abstract and Addendum shall be followed by a reference to the page number on which the material can be found in the brief.

(C) *Addendum.* The appellant's brief shall contain an Addendum, which consists of photocopies of documents from the record. It is the duty of the appellant to include in the Addendum such parts of the record, but only such parts, as are material to the points to be argued in the appellant's brief. The Addendum shall include true and legible photocopies of the original pleading, order from which the appeal is taken, and the notice of appeal. The Addendum shall also include any other relevant pleadings, jury instructions, documents, or exhibits essential to an understanding of the case. If parts of a prior trial or proceeding are important to the understanding of an issue, those parts of the record of that trial or proceeding must be included in the Addendum. (E.g., an appellant arguing in a Rule 37.1 appeal that his attorney allowed an improper jury instruction at trial must include the jury instruction at issue in the Addendum.) The appellee may prepare a supplemental Addendum if material on which the appellee relies is not in the appellant's Addendum. Only documents that are part of the trial court record may be included in the Addendum.

(2) *Cover for briefs.* On the cover of the brief there should appear the docket number and name of the case, the name of the court from which the appeal is taken, the title of the brief (e.g., "Brief for Appellant"), and the name of the appellant.

(3) *Insufficiency of appellant's abstract or Addendum.* Motions to dismiss the appeal for insufficiency of the appellant's abstract or Addendum will not

be recognized. Deficiencies in the appellant's abstract or Addendum will ordinarily come to the Court's attention and be handled in one of three ways as follows:

(A) If the appellee considers the appellant's abstract or Addendum to be defective, the appellee's brief should call the deficiencies to the Court's attention and may, at the appellee's option, contain a supplemental abstract or Addendum.

(B) If the case has not yet been submitted to the Court for decision, an appellant may file a motion to supplement the abstract or Addendum and file a substituted brief. Subject to the Court's discretion, the Court will routinely grant such a motion and give the appellant thirty days within which to file the substituted abstract, Addendum, and brief. If the appellee has already filed its brief, upon the filing of appellant's substituted abstract, Addendum, and brief, the appellee will be afforded an opportunity to revise or supplement its brief.

(C) Whether or not the appellee has called attention to deficiencies in the appellant's abstract or Addendum, the Court may address the question at any time. If the Court finds the abstract or Addendum to be deficient such that the Court cannot reach the merits of the case, or such as to cause an unreasonable or unjust delay in the disposition of the appeal, the Court will notify the appellant that he or she will be afforded an opportunity to cure any deficiencies, and has fifteen days within which to file a substituted abstract, Addendum, and brief. Mere modifications of the original brief by the appellant will not be accepted by the Clerk. Upon the filing of such a substituted brief by the appellant, the appellee will be afforded an opportunity to revise or supplement its brief. If after the opportunity to cure the deficiencies, the appellant fails to file a complying abstract, Addendum and brief within the prescribed time, the trial court's order may be affirmed for noncompliance with the Rule.

(4) *Non-compliance.* Briefs not in compliance with this Rule shall not be accepted for filing by the Clerk. When a party submits a brief on time that substantially complies with these Rules, the Clerk shall mark the brief "tendered", grant the party a fourteen-day compliance extension, and return the brief to the party for correction. If the party resubmits a compliant brief within fourteen calendar days, then the Clerk shall accept that brief for filing on the date it is received.

(d) *Number of briefs and time for filing.*

(1) *Briefs in chief.* The appellant shall have 40 days from the date the transcript is lodged to file 8 copies of the brief with the Clerk.

(2) *Appellee's brief.* The appellee shall have 30 days from the filing of the appellant's brief to file 8 copies of the brief with the Clerk and serve a copy on the appellant.

(3) *Reply brief.* The appellant shall have 15 days from the date that the appellee's brief is filed to file 8 copies of the reply brief.

(4) *Continuances and extensions of time.* The Clerk or a deputy clerk may extend the due date of any brief by seven (7) calendar days upon oral or letter request. If such an extension is granted, no further extension shall be granted except by the Court upon a written motion showing good cause. (Adopted May 18, 2006, effective June 1, 2006; amended May 15, 2008; amended October 29, 2009, effective January 1, 2010.)

lodged on or after June 1, 2006.

CASE NOTES

ANALYSIS

Addendum.

Enlarged argument.

Motion denied.

Addendum.

In defendant's appeal of the denial of postconviction relief, defendant's motion to supplement the addendum with affidavits was denied because the motion did not identify the affiants, the nature of the affiants' statements, or the purported purpose for which defendant obtained the affidavit; defendant failed to show that the affidavits were a part of the trial court record pursuant to subdivision (c)(2) of this rule. *Hill v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 21 (Jan. 30, 2009).

Enlarged Argument.

Defendant's motion to file an enlarged argument section in defendant's brief-in-chief in

defendant's appeal of the denial of postconviction relief was moot because defendant submitted a brief that complied with the page limit in subdivision (b)(2) of this rule. *Hill v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 21 (Jan. 30, 2009).

Motion Denied.

Petitioner was not allowed to file a supplemental abstract, addendum and brief, because subdivision (d)(3) of this rule allowed an appellant to file a reply brief within fifteen days from the date that an appellee's brief was filed, and the petitioner chose not to file such a brief. *McArty v. Hobbs*, 2012 Ark. 257, — S.W.3d —, 2012 Ark. LEXIS 270 (May 31, 2012).

Rule 4-8. Procedure for no-merit briefs, pro se points, and responses in involuntary-commitment cases.

(a) After studying the record and researching the law, if appellant's counsel in an involuntary-commitment case determines that the appellant has no meritorious basis for appeal, then counsel may file a no-merit brief and move to withdraw. Counsel's no-merit brief must include the following information:

(1) The argument section of the brief shall list all adverse rulings to the appellant made by the circuit court on all objections, motions, and requests made by the party at the hearing from which the appeal arose and explain why each adverse ruling is not a meritorious ground for reversal.

(2) The abstract and addendum shall contain all rulings adverse to the appellant made by the circuit court at the hearing from which the order of appeal arose.

(b) Appellee is not required to, but may, respond to a no-merit brief. Appellee may file a concurrence letter supporting the no-merit brief. Any appellee's response shall be filed within thirty (30) days of the filing of the no-merit brief.

(c) The Clerk of the Supreme Court shall mail the appellant, at the appellant's last known address, a copy of the no-merit brief and the motion to withdraw. The Clerk shall notify the appellant in writing that the appellant may raise any points that the appellant chooses and that these points may be typewritten or hand-printed. The Clerk shall also notify the appellant that the points must be received by the Supreme Court Clerk by mail or other method of delivery within thirty (30) days from the date that the Clerk mailed the appellant the notification.

(d) The Clerk shall mail a copy of appellant's points to the appellee and appellant's counsel within three (3) business days after receiving them.

(e) Appellee is not required to respond to appellant's points. Appellee may do so, however, by filing a response within thirty (30) days of the date the points were received by the Clerk of the Supreme Court. (Adopted September 24, 2009.)

Explanatory Note. In appeals in criminal, termination-of-parental-rights, and adult long-term protective-custody cases, appointed counsel may discharge their professional obligations by filing a no-merit brief and moving to withdraw. The Clerk must serve the brief and motion on the appellant, who then has the opportunity to file pro se points, which the appellee may in turn respond to. Ark. Sup. Ct. R. 4-3(j) and 6-9(i); *see generally Anders v. California*, 386 U.S. 738 (1967); *Linker-Flores v. Ark. Dep't of Human Sews.*, 359 Ark. 131, 194 S.W.3d 739 (2004); *Adams v. Ark. Dep't of Health & Human Sews.*, 375 Ark. 402, — S.W.3d — (2009). This procedure balances the appellant's right to counsel on appeal and due process with the lawyer's obligation as an officer of the court not to pursue frivolous

arguments. Involuntary-commitment cases raise similar constitutional and procedural concerns. But no *Anders* procedure currently exists in our rules for those kinds of cases. While the deprivation of liberty is neither as extended as a prison sentence nor as final as losing parental rights, involuntary commitment is nonetheless a "massive curtailment of liberty," and thus constitutionally significant. *Humphrey v. Cady*, 405 U.S. 504, 509 (1972). The supreme court recently noted this issue, *Dickinson v. State*, 372 Ark. 62, 67, 270 S.W.3d 863 (2008), but did not decide whether an *Anders* procedure is needed in involuntary-commitment cases. *Dickinson*, 372 Ark. at 70-71, 270 S.W.3d at 866-67 (Imber and Brown, JJ., dissenting). The new rule creates this procedure for these cases.

ARTICLE V. ARGUMENTS AND OPINIONS

Rule 5-1. Oral arguments.

(a) *Written request required.* Any party may request oral argument by filing, contemporaneously with that party's brief, a letter, separate from the brief, stating the request with a copy to all parties. The request for oral argument may be filed contemporaneously with either the party's initial brief or reply brief. Oral argument will be allowed upon request unless it is determined that

(1) the appeal is frivolous;

(2) the dispositive issue or set of issues has been decided authoritatively; or

(3) the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the decision-making process.

The court may at its discretion and on its own motion select any case for oral argument when it appears to the court that the matters presented for consideration are such that oral arguments are appropriate for a full presentation of the issues.

(b) *Argument date fixed.* The Clerk will notify counsel or the parties of the date oral argument is to be held or that the case will be submitted on briefs only. Thereafter, the date for argument may be changed only upon written motion to the court and upon a showing of good cause. If attempts to schedule oral argument may result in undue delay, the court may decide the case without oral argument. Counsel who have not requested oral argument are not required to appear at the argument but must, at least five days before the date the argument is to be heard, notify the Clerk in writing that they do not intend to appear. If counsel fails to provide notification and makes no appearance, he or she shall be subject to sanctions under Rule 11 of the Rules of Appellate Procedure—Civil.

(c) *Counsel and time limitations.* Only two attorneys will be heard for each side, and not more than 20 minutes will be allowed to each side for argument unless special leave of Court has been granted prior to the argument. Applications for additional time for argument must be by written motion, filed not less than one week before the case is scheduled for submission, and setting forth the reasons why additional time is necessary.

(d) *Apportionment of time.* The time allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair presentation of the case shall be made by the party having the opening and closing argument.

(e) *Reading from books.* Counsel are not permitted to read from books, briefs, or records, except those short extracts which they consider necessary to properly emphasize some point.

(f) *Substance of authorities stated.* Instead of reading authorities, counsel are expected to cite them in their briefs and to state the substance in argument.

(g) *Interruptions not permitted.* Counsel will not be permitted to interrupt opposing counsel with questions or otherwise, except by leave of the Court.

(h) *Petitions for rehearing.* Oral arguments are not permitted in support of or in opposition to petitions for rehearing.

(i) *Amici curiae counsel.* Amici Curiae counsel will not be permitted to participate in the oral argument.

(j) *Citing cases outside the brief.* If a case outside the brief is to be cited during oral argument, the citation must be furnished opposing counsel and the Court before the date of argument. (Amended June 30, 1997, effective September 1, 1997; amended October 12, 2000; amended January 22, 2004; amended June 3, 2010, effective July 1, 2010.)

Publisher's Notes. The Per Curiam order of the Supreme Court delivered on January 17, 1989, amending former Rule 18 read: "Rule 18(a) of the Rules of the Arkansas Supreme Court and Court of Appeals is amended to clarify the requirement for requesting oral argument. We find it advisable

to clarify the rule because some parties have assumed that a request for oral argument included in a brief will suffice. The intent of the rule is that there be a separate, written request filed with the clerk, therefore, the first paragraph of Rule 18(a) is amended."

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments, Alleviating Congestion in Arkansas Appellate

Courts: Recent Changes in the Appellate Process, 51 Ark. L. Rev. 453.

CASE NOTES

ANALYSIS

In general.

Argument.

Cases outside brief.

In General.

The requirements and the other guidelines of this rule are for the purpose of having arguments where all parties are fully prepared and, absent necessity or special permission, to read from books, counsel should make all responsible efforts to disclose their basic positions prior to arguments. *Medlock v. Leathers*, 311 Ark. 175, 842 S.W.2d 428

(1992), cert. denied 508 U.S. 960, 113 S. Ct. 2929, 124 L. Ed 2d 680 (1993).

The requirement that a party's request for oral argument must be filed contemporaneously with that party's brief does not mean that a party's request must accompany their initial appellate brief; such a request may accompany a reply brief. *Ferguson v. State*, 342 Ark. 273, 26 S.W.3d 787 (2000).

Argument.

The Supreme Court denied the appellee's motion to waive oral argument and advance the scheduling of the case for submission

where the oral arguments could be scheduled within two months. *Coca-Cola Bottling Co. v. Priddy*, 328 Ark. 94, 940 S.W.2d 497 (1997).

In defendant's appeal of the denial of post-conviction relief, defendant's motion to present an oral argument was denied because the request was not filed contemporaneously with the parties' briefs; it was clear that the briefs and record adequately submitted the facts and legal arguments presented, and granting an oral argument would not significantly aid the decision-making process, as required by

subdivision (a)(3) of this rule. *Hill v. State*, — Ark. —, — S.W.3d —, 2009 Ark. LEXIS 21 (Jan. 30, 2009).

Cases Outside Brief.

Appellant advocated a theory upon oral argument not advanced at any stage of the proceeding and relied upon authority which was not mentioned in appellant's brief and not furnished to opposing counsel prior to argument as required by this rule. *Travelers Ins. Co. v. McCluskey*, 252 Ark. 1045, 483 S.W.2d 179 (1972) (decision under prior rule).

Rule 5-2. Opinions.

(a) *Filing, Notice, and Publication.* The Supreme Court and Court of Appeals shall file every opinion with the Clerk, who shall provide a copy of the opinion to each pro se litigant and all counsel of record for each party in the case without charge. The Reporter of Decisions shall post every opinion on the Arkansas Judiciary's website and maintain a secure and searchable library of opinions on the website, which shall include all opinions issued after February 14, 2009. The Administrative Office of the Courts is authorized to develop an advanced search engine with additional features and to charge subscribers for its use. The Administrative Office of the Courts is also authorized to charge a reasonable fee for providing reports of opinions on disc or other physical medium.

(b) Official Reports.

(1) The *Arkansas Reports* and the *Arkansas Appellate Reports* shall contain the official report of decisions of the Supreme Court and Court of Appeals issued before February 14, 2009. The official report of decisions issued after that date shall be an electronic file created, authenticated, secured, and maintained by the Reporter of Decisions on the Arkansas Judiciary website.

(2) After an opinion is announced, the Reporter shall post a preliminary report of the opinion's text on the website. This version is subject to editorial corrections. After the mandate has issued, and any needed editorial corrections are made, the Reporter shall replace the preliminary report with an authenticated and secure electronic file containing the permanent and final report of the decision.

(3) Every report of every decision shall contain an official citation created by the Reporter. This citation shall include the year in which the decision was issued, the abbreviated name of the issuing court, and the sequential appellate decision number for the year. For example, the citation *White v. Green*, 2010 Ark. 171, reflects that the decision was issued in 2010, by the Arkansas Supreme Court, and was the one hundred seventy-first opinion issued by that court that calendar year. The citation *Roe v. State*, 2010 Ark. App. 745, reflects that this decision was made by the Court of Appeals and was the seven hundred forty-fifth appellate opinion issued by that court in calendar year 2010.

(c) *Precedential Value.* Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding. Opinions of the Supreme Court and Court of Appeals issued before July 1, 2009, and not designated for publication shall not be cited, quoted, or referred to by any court or in any

argument, brief, or other materials presented to any court (except in continuing or related litigation upon an issue such as res judicata, collateral estoppel, or law of the case).

(d) *Uniform citation.*

(1) Decisions included in the *Arkansas Reports* and *Arkansas Appellate Reports* shall be cited in all court papers by referring to the volume and page where the decision can be found and the year of the decision. Parallel citations to the regional reporter, if available, are required. Pinpoint citations to specific pages are strongly encouraged. For example:

Smith v. Jones, 338 Ark. 556, 558, 999 S.W.2d 669, 670 (1999).

Doe v. State, 74 Ark. App. 193, 198, 45 S.W.3d 860, 864 (2001).

(2) Published decisions issued between February 14, 2009, and July 1, 2009, and all decisions issued after July 1, 2009, and available on the Arkansas Judiciary website shall be cited in all court papers by referring to the case name, the year of the decision, the abbreviated court name, and the appellate decision number. Arkansas Supreme Court shall be abbreviated “Ark.” Arkansas Court of Appeals shall be abbreviated “Ark. App.” Parentheticals containing a date or court abbreviation shall not be used. Parallel citations to the regional reporter, if available, are required. If the regional reporter citation is not available, then parallel citations to unofficial sources, including unofficial electronic databases, may be provided. Pinpoint citations to specific pages are strongly encouraged. A pinpoint citation to the official version of a decision on the Arkansas judiciary website shall refer to the page of the electronic file where the matter cited appears. For example:

Smith v. Hickman, 2009 Ark. 12, at 1, 273 S.W.3d 340, 343.

Doe v. State, 2009 Ark. App. 318, at 7, 2009 WL 240613, at *8.

White v. Green, 2010 Ark. 171, at 3, 2010 WL 3109899, at *2.

Roe v. State, 2010 Ark. App. 745, at 6, 279 S.W.3d 495, 497.

(3) When an unpublished decision may be cited in continuing or related litigation pursuant to subdivision (c), the opinion’s date determines the citation form. Opinions issued before February 14, 2009, shall be cited by referring to the case name, the appellate docket number, the abbreviated name of the issuing court and the complete date of the opinion in the first parenthetical, and including “unpublished” in a second parenthetical. Opinions issued after February 14, 2009, and before July 1, 2009, shall be cited by referring to the case name, the year of the decision, the abbreviated court name, the appellate decision number, and including “unpublished” in a parenthetical. Parallel citations to unofficial sources, including unofficial electronic databases, may be provided. For example:

Holt v. Newbern, No. CA07-345, slip op. at 4, 2008 WL 30117, at *2 (Ark. App. Apr. 16, 2008) (unpublished).

Byrd v. Battle, 2009 Ark. App. 114, at 8, 2009 WL 47129, at *6 (unpublished).

(e) *Opinion Form.* Opinions of the Court of Appeals may be in conventional form or memorandum form.

(f) *Affirmance Without Opinion.* In appeals from decisions of the Arkansas Board of Review in unemployment-compensation cases, when the appellate court finds the decision appealed from is supported by substantial evidence, that there is an absence of fraud, no error of law appears in the record, and an opinion would have no precedential value, the order may be affirmed without opinion. (Amended May 28, 2009, effective July 1, 2009.)

Explanatory Note. Rule 5-2 has been completely rewritten to reflect the electronic publication of the official reports of appellate decisions. This comprehensive amendment is effective July 1, 2009.

Subdivision (a) reflects, in part, long-standing practice. All opinions are filed with the Clerk, and the Clerk sends a copy to each party or their lawyer if they have one. The Reporter of Decisions (or our Librarian) has been posting opinions on the Arkansas Judiciary website since 1996. As amended, the rule obligates the Reporter to continue doing so and to maintain a secure and searchable library containing all opinions issued after February 14, 2009, on the website. The rule also authorizes the Administrative Office of the Courts to develop and charge for the use of an advanced search engine. The AOC may also charge for providing the official reports in other formats, such as on CD.

Subdivision (b) has three parts. Section (1) defines what constitutes the official report of a decision of the Arkansas Supreme Court and Court of Appeals. For decisions issued before February 14, 2009, the official report is the opinion printed in a volume of the *Arkansas Reports* or *Arkansas Appellate Reports*. For opinions issued after that date, the official report is the electronic file created, authenticated, and maintained by the Reporter on the Arkansas Judiciary website.

Subdivision (b)(2) prescribes the Reporter's responsibilities in releasing and finalizing opinions. The first version of an opinion, the "preliminary report," must be posted on the website after the court announces the decision. The preliminary report is subject to editorial corrections by the Reporter. After the mandate has issued, and any editorial corrections have been made, the "final report" of the decision will be posted on the website in place of the preliminary report. Both the preliminary and final reports are official reports of the decision, which may be cited as otherwise allowed in the rule. All reports will be secure and authenticated.

Subdivision (b)(3) obligates the Reporter to create an official citation, in a new prescribed form, for every appellate decision issued after February 14, 2009. This date and July 1, 2009. The rule contains examples and an explanation of the new citation form—which looks much like a citation to the *Arkansas Reports* or *Arkansas Appellate Reports*. The book volume number has been replaced with the year of the decision. And the page number has been replaced with a "sequential appellate decision number for the year." The Reporter assigns this number, starting with 1 for the first opinion issued by each appellate court each calendar year. This is not a global numbering system covering all opinions of both appellate courts. Instead, there will be

one annual list for Supreme Court opinions and one annual list for Court of Appeals opinions.

Subdivision (c) eliminates the distinction between unpublished opinions. All opinions issued after July 1, 2009, are precedent and may be cited in any filing or argument in any court.

Subdivision (d) is entirely new. It prescribes a uniform citation form for all appellate decisions. If a decision appears in the *Arkansas Reports* or *Arkansas Appellate Reports*, then the familiar citation form must be used. The only new requirement is a parallel citation, if one is available, to the regional reporter. Pinpoint citations are strongly encouraged.

All opinions issued after February 14, 2009, will be in the new electronic database of official reports. These opinions must be cited using the new citation form described earlier: case name, year of decision, abbreviated court name, and sequential appellate decision number. The amended rule abandons parentheticals in almost all citations. With the date and issuing court embedded in the citation itself, the parenthetical is rendered superfluous. Parallel cites to a regional reporter, if available, are required. Parallel cites to other unofficial sources, such as electronic databases, are allowed but not required. Pinpoint citations are strongly encouraged in general. The amended rule also prescribes how to do a pinpoint cite to an electronic report (preliminary or final) of an Arkansas case: cite the page of the electronic file where the matter cited appears. The electronic file will be secure, with the pages locked in place so that they are the same no matter what computer they are viewed on.

Subdivision (d)(3) covers citation of unpublished decisions issued before the effective date of this rule (July 1, 2009). The opinion's date determines the citation form. Pre-February 14, 2009, unpublished opinions are cited by case name and docket number, with the abbreviated court name and full date in the first parenthetical and a second parenthetical denoting the unpublished status. Pinpoint cites should use the "slip opinion" designation. Unpublished opinions issued between February 1, 2009, and July 1, 2009, should be cited using the new citation form—year, abbreviated court name, and sequential appellate opinion number—with one additional element: a parenthetical denoting the opinion's "unpublished" status.

Subdivisions (e) and (f) are carry-overs from the old rule. The former authorizes the Court of Appeals to issue opinions in conventional or memorandum form. *In re Memorandum Opinions*, 15 Ark. App. 301, 700 S.W.2d 63 (1985) (per curiam). The latter authorizes unemployment appeals from the Board of Review to be affirmed without an opinion.

RESEARCH REFERENCES

ALR. Precedential effect of unpublished opinions, 105 ALR 5th 528.

Ark. L. Notes. Sheppard, The Unpublished Opinion Opinion: How Richard Arnold's *Anastasoff* Opinion is Saving America's Courts from Themselves, 2002 Ark. L. Notes 85.

Ark. L. Rev. Arkansas Appellate Practice: Abstracting The Record, 31 Ark. L. Rev. 359.

The Selective Publication of Opinions: One Court's Experience, 32 Ark. L. Rev. 26.

Rule 21: Unprecedented and the Disappearing Court, 32 Ark. L. Rev. 37.

Lawrence, A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court, 37 Ark. L. Rev. 418.

U. Ark. Little Rock L.J. Is Justice Delayed? A Report From The Court Administrator, Huie and Jegley, 1 U. Ark. Little Rock L.J. 51.

CASE NOTES

ANALYSIS

In general.

Issues considered.

Nonpublished opinions.

In General.

An unanimous opinion of the Supreme Court may be rendered as a per curiam opinion and not designated for publication at the discretion of the court; only those opinions of this court which are signed must be designated for publication. *Luna-Holbird v. State*, 315 Ark. 735, 871 S.W.2d 328 (1994).

Issues Considered.

In an appeal from a criminal conviction, the appellate court reviews any sufficiency of the evidence questions, including review of evidence that may have been erroneously admitted, before it considers any alleged trial errors; the appellate court does not evaluate whether evidence was admitted in error and then determine whether the remaining evidence is insufficient to sustain a conviction. *Willingham v. State*, 60 Ark. App. 132, 959 S.W.2d 74 (1998).

Nonpublished Opinions.

An opinion which qualifies as one not designated for publication is written primarily for the parties and their attorneys; nonpublished opinions will not be considered as authority and should not be cited to the court. *Aaron v. Everett*, 6 Ark. App. 424, 644 S.W.2d 301 (1982); *Yockey v. Yockey*, 24 Ark. App. 169, 750 S.W.2d 420 (1988) (preceding decisions under prior law).

Defendant's argument that the prohibition of this rule violated his right of due process

under Ark. Const., Art. II, §§ 8 and 21, was rejected because the federal judicial power clause had never before been construed to limit courts in the manner in which they conduct their business, and the same could be said for Arkansas's judicial article. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003).

Defendant's argument that the proscription of this rule violated his right to effective assistance of counsel was rejected when the fact that defendant's counsel could be restricted in arguing the facts of certain cases in no way restricted counsel from setting forth the facts of defendant's, and demonstrating how the facts failed to rise to the level of sufficient evidence. *Weatherford v. State*, 352 Ark. 324, 101 S.W.3d 227 (2003).

Where petitioner filed a motion to clarify the applicability of this rule, the Supreme Court of Arkansas held there was nothing to indicate that petitioner was impaired in seeking immediate appellate relief by not being able to rely on unpublished opinions. *Dodson v. Norris*, 373 Ark. 186, 282 S.W.3d 809 (2008).

Cited: *Rainbolt v. Everett*, 3 Ark. App. 48, 621 S.W.2d 877 (1981); *Mosley v. McGehee Sch. Dist.*, 30 Ark. App. 131, 783 S.W.2d 871 (1990); *Waldon v. Waldon*, 34 Ark. App. 118, 806 S.W.2d 387 (1991); *Pannell v. State*, 320 Ark. 390, 897 S.W.2d 552 (1995); *Smith v. State*, 320 Ark. 658, 898 S.W.2d 468 (1995); appeal denied 928 S.W.2d 799 (1996); *Rogerson v. Hot Springs Advertising & Promotion Comm'n*, 237 F.3d 929 (8th Cir. 2001); *Fetters v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 152, — S.W.3d —, 2012 Ark. App. LEXIS 237 (Feb. 15, 2012).

Rule 5-3. Mandate.

(a) *Mandate to be issued in all cases.* In all cases, civil and criminal, the Clerk will issue a mandate when the decision becomes final and will mail it to the clerk of the circuit court from which the appeal was taken for filing and recording. A decision is not final until the time for filing of petition for

rehearing or, in the case of a decision of the Court of Appeals, the time for filing a petition for review has expired or, in the event of the filing of such petition, until there has been a final disposition thereof.

(b) *Immediate issuance, upon leave of court.* No transcript of any judgment, decision or opinion of the Court shall be certified by the Clerk, or mandate issued, within 18 calendar days after the judgment is rendered without special leave of the Court or upon stipulation of counsel, except in the case of the denial of a petition under Rule 37 of the Arkansas Rules of Criminal Procedure, in which case the decision of the Court shall be certified by the Clerk and the mandate issued on the day the decision is rendered.

(c) *Stay of mandate.*

(1) Parties desiring to prosecute proceedings to the Supreme Court of the United States by filing a petition for a writ of certiorari may obtain an order either staying the issuance of a mandate or recalling a mandate upon motion to the Court and a showing that:

(A) the petition for a writ of certiorari presents a substantial question;

(B) there is good cause for a stay or a recall; and

(C) an order has been placed with the Clerk for a copy of the record, with payment of an advance deposit of \$50.00.

Such stay or recall is discretionary with the Court.

(2) The stay shall not exceed 90 days from the date the stay is issued, unless the period is extended for good cause or the party who obtained the stay timely files a petition with the Supreme Court of the United States and so notifies the Clerk of this Court, in which case the stay shall remain in effect until the Supreme Court's final disposition.

(3) Bond may be required as a condition for granting or continuing the stay.

(4) The Clerk shall issue the mandate immediately upon the filing of a copy of the Supreme Court order denying the petition for writ of certiorari.

(d) *Motion to recall mandate.* A motion to recall the mandate must be served upon opposing counsel, and an objection to the motion may be filed. Should the motion be granted, the moving party shall pay all costs accrued after the filing of the mandate. (Subsection (b) amended June 30, 1997, effective September 1, 1997; amended June 7, 2001, effective July 1, 2001; amended October 28, 2010.)

CASE NOTES

ANALYSIS

Federal habeas review.

Immediate issuance.

Stay.

Federal Habeas Review.

Arkansas Court of Appeals' decision became final, for purposes of triggering the one year limitations period set out in 28 U.S.C.S. § 2244(d)(1)(A), when it issued its mandate because petitioner did not seek review in subsection (a) of this rule, the appeals court could not issue its mandate until after the 18 days for filing an appeal from its judgment had expired. *Ben-Yah v. Norris*, 570 F. Supp. 2d 1086 (E.D. Ark. 2008).

Immediate Issuance.

Since alleged error was never cited in a petition for rehearing, see S. Ct. & Ct. App. Rule 2-3, and the Supreme Court was never afforded an opportunity to correct the supposed error, the disposition of the case was final under this rule. *Johnson v. State*, 321 Ark. 117, 900 S.W.2d 940 (1995).

Stay.

Where the State declared that it had no objection to the granting of defendant's motion to stay mandate affirming his conviction pending action by the United States Supreme Court, the motion for stay was granted. *Bowen v. State*, 323 Ark. 233, 913 S.W.2d 304,

cert. denied, 517 U.S. 1226, 116 S. Ct. 1861, 134 L. Ed. 2d 960 (1996).

Supreme Court of Arkansas declined to recall its mandate denying petitioner's request for post-conviction relief and writ of error coram nobis as petitioner's claims of juror misconduct did not fall within any of the categories of errors for which error coram nobis could provide relief. *Echols v. State*, 360 Ark. 332, 201 S.W.3d 890 (2005).

Cited: *Majors v. Pulaski County Election Comm'n*, 287 Ark. 208, 697 S.W.2d 535 (1985);

Owen v. Dalton, 296 Ark. 351, 757 S.W.2d 921 (1988); *Clark v. State*, 308 Ark. 453, 824 S.W.2d 345 (1992); *Scalco v. City of Russellville*, 318 Ark. 61, 883 S.W.2d 471 (1994); *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996); *Barker v. Rogers Group, Inc.*, 74 Ark. App. 18, 45 S.W.3d 389 (2001); *Mountain Pure LLC v. Affiliated Foods Southwest, Inc.*, 366 Ark. 62, 233 S.W.3d 609 (2006); *McCourt Mfg. Corp. v. Rycroft*, 2010 Ark. 93, 360 S.W.3d 138 (2010).

ARTICLE VI. SPECIAL PROCEEDINGS

Rule 6-1. Extraordinary writs, expedited consideration, and temporary relief.

(a) *Extraordinary writs.*

(1) Proceedings for an extraordinary writ such as prohibition, mandamus, and certiorari are commenced by filing an original petition in the Supreme Court. These writs are not available if appeal is an adequate remedy. A party seeking appellate review of a circuit court's decision on a request for an extraordinary writ must file a notice of appeal in the circuit court, not a petition for the writ in the appellate court. When a party petitions the appellate court for an extraordinary writ, the pleadings with certified exhibits from the circuit court, if applicable, are treated as the record.

(2) If the petition falls within subsection (b) or (c) of this Rule, the petitioner is required to file the original and seven copies of the petition along with the record with the Clerk. Evidence of service of a copy upon the adverse party or his or her counsel of record in the circuit court is required. If the proceeding falls within subsection (e) of this Rule, the petitioner is required to file only the original petition along with the certified record.

(3) When the petition includes a certified copy of the record in the circuit court, the petitioner shall serve a copy of that record on the adverse party or his or her counsel. In prohibition cases, the petitioner shall also serve a copy of the record on the circuit judge, who is ordinarily a nominal party and is not required to file a response.

(b) *Emergency or accelerated proceedings.* In situations where time limitations do not allow a proper response time of ten days, upon the filing of the pleading, the pleader shall inform the Clerk's office of the need for an emergency or accelerated hearing by the Court. Upon notification, the Court will determine the date of the response and date of consideration of the pleading. If the pleader desires oral argument, such argument will be addressed to the Court at the regularly called sessions at 9:00 a.m. on Thursday (in the Supreme Court) or Wednesday (in the Court of Appeals) morning; otherwise, oral argument will not be entertained. The pleading must be properly filed and the party or attorney of record notified before oral argument will be heard.

(c) *Applications for temporary relief.* When the petitioner intends to apply to the full Court for temporary relief staying the circuit court proceedings pending the consideration of the petition upon its merits, eight copies of the petition must be filed, and reasonable notice of the application for temporary

relief must be served upon the other party or the counsel of record in the circuit court and the circuit court. If, after its review and consideration of the record and pleading filed, the Court shall determine that a temporary stay is warranted and granted, briefs shall be required as in other cases under Rule 4-4, and the parties' brief time will be calculated from the date the temporary relief is granted. However, the Court may decide the matter without ruling on the request for a briefing schedule.

(d) *Response.* A response to an application for temporary relief in subsection (c) may be filed within 10 calendar days unless modified by the Court. Additional time for filing a response must be requested within the 10 day period.

(e) *Page limitation.* Absent leave of court for good cause shown, no petition or response shall exceed fifteen pages excluding any addendum.

(f) *Time for filing briefs.* If the proceedings in the circuit court have been stayed, or the time before a hearing or trial will allow a briefing schedule, briefs are required as in other cases, the parties' brief time under Rule 4-4 for filing a brief to be calculated from the date on which the petition is filed. The mere filing of a petition for relief under this section does not automatically entitle the petitioner to file briefs and stay the proceedings in the circuit court. (Subsection (b) amended June 30, 1997, effective September 1, 1997; subsections (a), (c), and (e) amended June 7, 2001, effective July 1, 2001; amended October 9, 2008, effective January 1, 2009; amended June 3, 2010, effective July 1, 2010.)

RESEARCH REFERENCES

Ark. L. Rev. Arkansas Appellate Practice: Abstracting The Record, 31 Ark. L. Rev. 359.

CASE NOTES

ANALYSIS

In general.

Briefs.

Failure to file timely answer.

Failure to seek extraordinary relief.

Period for granting extension.

Right to writ.

Service upon trial judge.

Writ of certiorari.

Writ of mandamus.

Writ of prohibition.

In General.

A writ of prohibition is issued to prohibit a court from acting, while a writ of certiorari is issued to direct a judge to perform a duty. *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994).

The Supreme Court's jurisdiction is appellate in nature except where specific law or precedent has established authority for it to proceed in an original action. *Jackson v. Tucker*, 325 Ark. 318, 927 S.W.2d 336 (1996).

Briefs.

A petitioner bears the burden of producing a fair and accurate record and abstract that establish an entitlement to a writ; an ambig-

uous record cannot satisfy the petitioner's burden. *City of Little Rock v. Pulaski County Circuit Court*, 330 Ark. 755, 957 S.W.2d 684 (1997).

Petition for writ of prohibition denied where record was insufficient. *Dean v. Plegge*, 331 Ark. 141, 958 S.W.2d 5 (1998).

Failure to File Timely Answer.

Where defendant failed to answer until after the time for an answer had expired, the court was not required to enter a default judgment; therefore, mandamus to require it could not be granted. *Burney v. Hargraves*, 264 Ark. 680, 573 S.W.2d 912 (1978) (decision under prior rule).

Failure to Seek Extraordinary Relief.

Where a candidate timely filed a complaint contesting the certification of election results, but filed his verifying affidavit four days after the deadline for the complaint, the action was properly dismissed for lack of subject matter jurisdiction because the statutory language setting the deadline for filing the complaint was unambiguous, the deadline itself was mandatory and jurisdictional, and the candidate did not bring his appeal from the dismis-

sal to the attention of the reviewing court. *Willis v. King*, 352 Ark. 55, 98 S.W.3d 427 (2003).

Period for Granting Extension.

Where trial court, more than 90 days after the filing of the notice of appeal, granted additional time to prepare and file the transcript and entered the order "nunc pro tunc" giving a date within such 90-day period, such appeal would be dismissed because not in compliance with this rule, since the order of extension was not actually made within the period allowed. *Canal Ins. Co. v. Arney*, 258 Ark. 893, 530 S.W.2d 178 (1975) (decision under prior rule).

Right to Writ.

An extraordinary writ will not be granted unless the petitioner is clearly entitled to the relief sought; if a petitioner loses a right of appeal through no fault of his own, he is entitled to certiorari. *Irvan v. Kizer*, 286 Ark. 105, 689 S.W.2d 548 (1985) (decision under prior rule).

Service Upon Trial Judge.

Where appellant's motion for stay of a retrial contained a statement that it had been served on all parties to the proceeding but did not show that it had been served on the trial court, the appellant's motion was denied without prejudice. *Martin v. State*, 327 Ark. 419, 938 S.W.2d 234 (1997).

Writ of Certiorari.

A writ of certiorari lies where there is a lack of jurisdiction or there has been an act in excess of jurisdiction that is apparent on the face of the record; it is not to be used to look beyond the face of the record to ascertain the actual merits of a controversy, or to control discretion, or to review a finding of facts, or to reverse a trial court's discretionary authority. *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994).

In newspaper's petition for writ of certiorari, asserting constitutional violations, it sought the dissolution of an injunction, restraining order, and protective order that prohibited the newspaper from publishing information relating to a pending case, however, the record had been sealed, and without a certified copy of the circuit court's order before the Arkansas Supreme Court, the Court had no basis on which to act; thus, the Court ordered the clerk to certify and transmit under seal the circuit court's order and any related pleadings within 30 days and it ordered the court reporter in the underlying case to transcribe the subject hearing and to certify and transmit it to the Court under seal within 30 days. *The Helena Daily World v. Phillips County Circuit Court*, 361 Ark. 146, 205 S.W.3d 134 (2005).

Writ of Mandamus.

Prisoner's motion for rule on clerk and motion for a hearing were denied because the prisoner, who petitioned for writ of mandamus compelling certain action by a circuit court judge, did not include the record of the circuit court proceedings which, pursuant to subsection (a) of this rule, was necessary for the supreme court to rule on the prisoner's mandamus petition. *Sherman v. Wyatt*, — Ark. —, — S.W.3d —, 2008 Ark. LEXIS 284 (Apr. 24, 2008).

Because a candidate did not comply with Ark. R. Civ. P. 78(d) and subsection (b) of this rule in contesting a declaration that the candidate was ineligible to hold office under § 7-5-207(b), the lapse of time and the fact that the election had already been held rendered moot the issues presented on appeal. *Fite v. Grulkey*, 2011 Ark. 188, — S.W.3d —, 2011 Ark. LEXIS 166 (Apr. 28, 2011).

Writ of Prohibition.

Where, without notice to the child's natural mother, the trial court entered an interlocutory order of adoption and the trial court did not respond to the mother's request that a final order be entered, the mother was entitled to a writ of prohibition. *Irvan v. Kizer*, 286 Ark. 105, 689 S.W.2d 548 (1985) (decision under prior rule).

A writ of prohibition cannot be substituted for the normal remedy by appeal. *Village Creek Imp. Dist. v. Story*, 287 Ark. 200, 697 S.W.2d 886 (1985) (decision under prior rule).

Prohibition is an extraordinary writ and is never issued to prohibit a trial court from erroneously exercising its jurisdiction, only where it is proposing to act in excess of its jurisdiction. *Abernathy v. Patterson*, 295 Ark. 551, 750 S.W.2d 406 (1988) (decision under prior rule).

The purpose of a writ of prohibition is not to prohibit a lower court from committing error, but to prohibit the unauthorized exercise of jurisdiction when there is no other adequate remedy available by appeal or otherwise. *McGlothlin v. Kemp*, 314 Ark. 495, 863 S.W.2d 313 (1993).

A writ of prohibition is never issued to prevent a trial court from erroneously exercising jurisdiction; it is issued only where the trial court is wholly without jurisdiction. *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994).

A writ of prohibition is an extraordinary writ and is granted only when the lower court is wholly without jurisdiction, when there are no disputed facts, when there is no adequate remedy otherwise, and when the writ is clearly warranted. *Dougan v. Gray*, 318 Ark. 6, 884 S.W.2d 239 (1994).

A writ of prohibition is extraordinary relief which is appropriate only when the trial court is wholly without jurisdiction, when there is

no other remedy such as an appeal available, and will not be issued for something that has already been done. *Pike v. Benton Circuit Court*, 340 Ark. 311, 10 S.W.3d 447 (2000), rev'd, dismissed 344 Ark. 478, 40 S.W.3d 795 (2001).

Once the trial court acted by entering the judgment at the third probation revocation hearing, the remedy became an appeal of this final order by the court, not a petition for writ of prohibition. *Pike v. Benton Circuit Court*, 340 Ark. 311, 10 S.W.3d 447 (2000), rev'd, dismissed 344 Ark. 478, 40 S.W.3d 795 (2001).

Cited: *Thornton v. Roberts*, 258 Ark. 91, 522 S.W.2d 836 (1975); *Mann v. Britt*, 266 Ark. 100, 583 S.W.2d 21 (1979); *Franklin v. State*, 267 Ark. 311, 590 S.W.2d 28 (1979); *Miller v. Lofton*, 272 Ark. 164, 612 S.W.2d 732 (1981); *Carter v. F.W. Woolworth Co.*, 287 Ark. 39, 696 S.W.2d 318 (1985); *Tyson v. Roberts*,

287 Ark. 409, 700 S.W.2d 50 (1985); *Vasquez v. State*, 287 Ark. 468, 701 S.W.2d 357 (1985); *American Trucking Ass'n v. Gray*, 288 Ark. 488, 707 S.W.2d 759 (1986), vacated 483 U.S. 1014, 107 S. Ct. 3252, 97 L. Ed. 2d 752 (1987); *Jolly v. Hartje*, 289 Ark. 570, 713 S.W.2d 241 (1986); *Cooper v. Langston*, 296 Ark. 306, 756 S.W.2d 896 (1988); *Miller v. Langston*, 296 Ark. 486, 757 S.W.2d 562 (1988); *Hester v. Langston*, 297 Ark. 87, 759 S.W.2d 797 (1988); *Gilmer v. Jefferson County Circuit Court*, 301 Ark. 143, 782 S.W.2d 368 (1990); *Bryant v. Ruff*, 303 Ark. 330, 798 S.W.2d 417 (1990); *Cox v. Lineberger*, 304 Ark. 231, 801 S.W.2d 290 (1990); *Lupo v. Lineberger*, 311 Ark. 80, 841 S.W.2d 158 (1992); *Glover v. Shirron*, 314 Ark. 226, 861 S.W.2d 110 (1993); *Simpson v. Sheriff of Dallas County*, 333 Ark. 277, 968 S.W.2d 614 (1998).

Rule 6-2. Appeals prosecuted for purposes of delay.

(a) *Motion alleging delay.* When counsel for the appellee has examined the record and believes that the appeal has been prosecuted merely for the purposes of delay, counsel may file a motion alleging such delay with a plea to the Court to advance and affirm.

(b) *Contents of motion.* The motion shall provide citations to the record to show that the appeal has been prosecuted merely for the purpose of delay. Counsel shall state in the motion that he or she has carefully examined the record and specify the reasons for the belief that the appeal has been filed for the purpose of delay.

(c) *Procedure.* The motion shall be in the form required by Rule 2-1 and will be called for submission three weeks after filing.

(d) *Response.* Counsel for the appellant may file a response within 21 days of the filing of the motion.

RESEARCH REFERENCES

Ark. L. Rev. Lawrence, A Very Short Article on the Precedential Value of the Opinions from an Equally Divided Court, 37 Ark. L. Rev. 418.

CASE NOTES

Strict Compliance.

This rule requires that counsel for the appellee endorse on the record a statement that he believes the appeal is prosecuted for delay. The requirement, being penal, must be strictly observed; so it is not the Supreme Court's practice to penalize an appellant for delay when the requirement has not been met. *Dorazio v. Davis*, 283 Ark. 65, 671 S.W.2d 173 (1984) (decision under prior rule).

Cited: *Wilson v. State*, 286 Ark. 430, 692 S.W.2d 620 (1985); *Arkansas Blue Cross & Blue Shield, Inc. v. Doe*, 22 Ark. App. 89, 733 S.W.2d 429 (1987), questioned *Garred v. General American Life Ins. Co.*, 774 F. Supp. 1190 (W.D. Ark. 1991); *Thomas v. State*, 300 Ark. 103, 776 S.W.2d 821 (1989); *Bush v. Bush*, 306 Ark. 513, 816 S.W.2d 590 (1991); *Swanson v. State*, 308 Ark. 28, 823 S.W.2d 812 (1992) (preceding decisions under prior rule).

Rule 6-3. Anonymity in certain appellate proceedings, opinions and case styles.

(a) *Scope.* In an appeal in which counsel for either side believes that a person's identity should be protected by the Court, counsel may move the Court to do so. These cases may include, but are not limited to, adoptions and appeals in juvenile cases.

(b) *Appellant as movant.* If the movant is the appellant in the case, the motion shall be filed at the time the transcript is tendered for filing to the Clerk. The person whose identity is sought to be protected shall be referred to using the initials of the first and last names in the motion and on the cover of the transcript, if applicable. Upon filing the motion, the Clerk shall seal the record pending the Court's decision on the motion.

(c) *Appellee as movant.* If the movant is the appellee in the case, the motion shall be filed within 5 days, excluding weekends and holidays, of the date the record is filed. The person whose identity is sought to be protected shall be referred to using the initials of the first and last names in the motion. Upon filing the motion, the Clerk shall seal the record pending the Court's decision on the motion.

(d) *Service.* A copy of the motion must be served upon opposing counsel who will have 10 days to respond and serve the movant. Opposing counsel shall also use only the initials of the first and last names of the person at issue in any response.

(e) *Motion granted.* If the Court grants the motion, the Clerk shall ensure that the cover of the tendered transcript complies with the Court's order. Counsel and the Court shall preserve the person's anonymity by using the initials of the first and last names in all subsequent captions, opinions, motions, and briefs, as well as in oral argument, if any. The records and papers on appeal shall be open for inspection only to counsel of record, or, only upon order of the Court, to others demonstrating by written motion a proper interest in the documents.

(f) *Motion denied.* If the Court denies the motion, the Clerk shall substitute the person's full name on the cover of the transcript, if applicable, and the appeal shall proceed in accordance with these Rules. (Amended June 7, 2001, effective July 1, 2001.)

CASE NOTES

Cited: Arkansas Dep't of Human Servs. v. Arkansas Best Corp. v. General Elec. Capital Hardy, 316 Ark. 119, 871 S.W.2d 352 (1994); Corp., 317 Ark. 238, 878 S.W.2d 708 (1994).

Rule 6-4. Motion requesting disqualification.

Counsel for any party may file a motion requesting that one or more justices or judges disqualify. The motion shall be in the form required by Rule 2-1 and shall state the particular facts alleged to require the disqualification. The motion shall be filed a reasonable time prior to the submission of the case to the Court.

Cross References. As to the disqualification of justices, see Ark. Const., Art. 7, § 20 and § 16-11-108.

CASE NOTES

ANALYSIS

Actions of justices.
Social relationships.
Timeliness.

Actions of Justices.

In a case involving the appeal of an appointment of the minor political party representative to the State Ethics Commission by the Chief Justice, all seven members of the State Supreme Court disqualified themselves from participation in the appeal. *Spradlin v. Arkansas Ethics Comm'n*, 310 Ark. 458, 837 S.W.2d 463 (1992) (decision under prior rule).

Social Relationships.

Motion for vacatur, treated as a Letter of Suggestion of Disqualification under former Rule 27, alleging that the Chief Justice had a social relationship with an attorney involved

in this case and, therefore, all members of the Supreme Court should disqualify, denied. *First Pyramid Life Ins. Co. of Am. v. Stoltz*, 312 Ark. 516, 849 S.W.2d 525 (1993) (decision under prior rule).

Timeliness.

Although a party should not delay filing a motion to disqualify until the party receives an unfavorable ruling, the party may move to disqualify after a decision had been rendered for purposes of a rehearing only. *R.J. "Bob" Jones Excavating Contractor v. Firemen's Ins. Co.*, 325 Ark. 42, 922 S.W.2d 723 (1996).

Cited: *Johnson Timber Corp. v. Sturdivant*, 295 Ark. 622, 752 S.W.2d 241 (1988), set aside 758 S.W.2d 415 (1988) (decision under prior rule).

Rule 6-5. Original actions.

(a) *Original jurisdiction.* The Supreme Court shall have original jurisdiction in extraordinary actions as required by law, such as suits attacking the validity of statewide petitions filed under Amendment 7 of the Arkansas Constitution, or where the Supreme Court's contempt powers are at issue.

(b) *Procedure.* In such proceedings, the procedure will conform to that prevailing in bench trials in the circuit courts. Upon filing the original and seven copies of the pleading and payment of a filing fee, a summons or other process will be issued by the Clerk. The respondent's pleading must be filed within the time provided by the Rules of Civil Procedure.

(c) *Fact finding.* Evidence upon issues of fact will be taken by a master to be appointed by the Court. As a condition to the appointment of a master, the Court may require both parties to file a bond for costs to be approved by the Clerk. Upon the filing of the master's findings, the parties shall file briefs as in other cases.

(d) *Fact finding unnecessary.* When the issues involve questions of law only, and there is no need for appointment of a master to determine facts, the parties shall file briefs as in other cases. Time limits under Rule 4-4 will be calculated from the date the respondent's pleading is filed or due to be filed. (Amended June 30, 1997, effective September 1, 1997; amended June 7, 2001, effective July 1, 2001.)

CASE NOTES

ANALYSIS

In general.
Contempt.
Costs.
Duty to abstract.
Illustrative case.

In General.

The Supreme Court's jurisdiction is appellate in nature except where specific law or precedent has established authority for it to proceed in an original action. *Jackson v. Tucker*, 325 Ark. 318, 927 S.W.2d 336 (1996).

Contempt.

Although not mentioned in this rule, the Supreme Court has exercised original jurisdiction where its contempt powers were at issue. *Jackson v. Tucker*, 325 Ark. 318, 927 S.W.2d 336 (1996).

Costs.

All costs ordered to be shared equally between the petitioners and the intervenors because the respondent Secretary of State was not subject to payment of costs because of sovereign immunity. *Scott v. Priest*, 326 Ark.

69, 928 S.W.2d 337 (1996), dismissed 326 Ark. 466, 932 S.W.2d 751 (1996).

Duty to Abstract.

Where the petitioners alleged that this rule was invoked by the majority court in an uneven manner, it was the petitioners' burden, not the respondent's or intervenor's, to show error. Whether respondent or intervenor abstracted any part of the record does not eliminate petitioners' duty to do so. *Plugge v. McCuen*, 310 Ark. 654, 841 S.W.2d 139 (1992), overruled *Bailey v. McCuen*, 318 Ark. 277, 884 S.W.2d 938 (1994) (decision under prior rule).

Illustrative Case.

Master appointed and directed to conduct proceedings in accordance with subsection (a)

of this rule and ARCP 53 in a case involving a proposed constitutional amendment. *Holt v. Priest*, 326 Ark. 277, 930 S.W.2d 359 (1996).

Cited: Supreme Court Comm. on Professional Conduct v. Muhammed, 291 Ark. 225, 723 S.W.2d 828 (1987); *Casteel v. McCuen*, 310 Ark. 400, 835 S.W.2d 885 (1992); *Porter v. McCuen*, 310 Ark. 403, 835 S.W.2d 886 (1992) (preceding decisions under prior rule); *Bailey v. McCuen*, 318 Ark. 49, 884 S.W.2d 937 (1994); *Parker v. Priest*, 326 Ark. 123, 930 S.W.2d 322 (1996); *Schlaf v. Priest*, 326 Ark. 275, 929 S.W.2d 164 (1996), dismissed 930 S.W.2d 384 (1996); *Parker v. Priest*, 326 Ark. 386, 931 S.W.2d 108 (1996); *Roberts v. Priest*, 334 Ark. 503, 975 S.W.2d 850 (1998); *Roberts v. Priest*, 335 Ark. 137, 979 S.W.2d 453 (1998).

Rule 6-6. Pauper's oath and motions for attorney's fees in criminal cases.

(a) *Pauper's oath and affidavit; requirement.* It shall be required that all pro se petitions or motions and all petitions or motions filed by counsel seeking relief on behalf of a client who is claiming the status of an indigent, filed in the Supreme Court or the Court of Appeals, be accompanied by an assertion of indigency, verified by a supporting affidavit. The affidavit form will be provided by the Clerk of the Court for such purposes. Any petition or motion not in compliance with this Rule will be returned to the petitioner or counsel for failure to comply.

(b) *Form for affidavit in support of request to proceed in forma pauperis.* The form of the affidavit shall be as follows:

IN THE SUPREME COURT OF ARKANSAS
OR ARKANSAS COURT OF APPEALS

_____	PETITIONER
V.	NO. _____
STATE OF ARKANSAS	RESPONDENT

AFFIDAVIT IN SUPPORT OF
REQUEST TO PROCEED *IN FORMA PAUPERIS*

I, _____, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes _____ No _____
- (a) If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer. _____
- (b) If the answer is no, state the date of last employment and the amount of the salary and wages per month which you received. _____

2. Have you received within the past twelve months any money from any of the following sources?

(a) Business, profession or any form of self-employment?

Yes _____ No _____

(b) Rent payments, interest or dividends? Yes _____ No _____

(c) Pensions, annuities or life insurance payments? Yes _____

No _____

(d) Gifts or inheritances? Yes _____ No _____

(e) Any other sources? Yes _____ No _____

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months. _____

3. Do you own any cash, or do you have money in a checking or savings account? Yes _____ No _____

If the answer is yes, state the total amount in each account. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)? Yes _____ No _____

If the answer is yes, describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. _____

6. TO BE COMPLETED ONLY IF PETITIONER IS INCARCERATED IN THE ARKANSAS DEPARTMENT OF CORRECTION OR ANY OTHER PENAL INSTITUTION.

Do you have any funds in the inmate welfare funds? Yes _____

No _____

If the answer is yes, state the total amount in such account and have the certificate found below completed by the authorized officer of the institution. _____

I understand that false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Signature of Petitioner

STATE OF _____

COUNTY OF _____

Petitioner, _____, being first duly sworn under oath, presents that he/she has read and subscribed to the above and states that the information therein is true and correct.

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19____.

Notary Public

My commission expires: _____

CERTIFICATE

(To be completed by authorized officer of penal institution)
I hereby certify that the petitioner herein, _____
_____, has the sum of \$ _____ on account to his/her credit
at the _____ institution where he/she is confined.
I further certify that petitioner likewise has the following securities to
his/her credit according to the records of said _____
institution: _____

Authorized Officer of
Institution

(c) *Content of motions for attorney’s fees.* All motions for attorney’s fees from attorneys appointed to represent indigent appellants in criminal cases shall contain the following information: (1) the date of appointment; (2) the court which appointed counsel; (3) the number of hours expended by counsel in research, court appearances, and preparation of pleadings and briefs; (4) counsel’s customary rate of compensation in similar cases; (5) the customary rate of compensation in similar cases of attorneys in the community; (6) expenses incurred by counsel which are directly attributable to the case; (7) the experience of counsel in the representation of criminal appellants; and (8) the relative complexity of the case. The motion shall be filed not later than 30 days after the issuance of the mandate. (Amended May 27, 1997.)

Publisher’s Notes. Although the Per Curiam of May 27, 1997 purported to amend and republish this rule, only subsection (a) and the beginning of subsection (b) were pub-

lished. Subsection (c) was neither specifically included nor specifically deleted; the omission of subsection (c) from the Per Curiam order was apparently an oversight.

CASE NOTES

ANALYSIS

- In general.
- Applicability.
- Defendant’s burden.
- Denial of motion.
- Motion granted.
- Noncompliance.
- Timeliness.

In General.

There is no need to remand a case for a determination of indigence. *Burkhalter v. State*, 328 Ark. 93, 940 S.W.2d 496 (1997).
Appellate court appointed new counsel for defendant and granted a motion for belated appeal after defendant’s attorney abandoned the case following defendant’s conviction; as required by this rule, defendant’s status as an indigent would be determined after an assertion of indigency, verified by a supporting affidavit, was filed with the Arkansas Supreme Court. *Velcoff v. State*, 363 Ark. 454, 214 S.W.3d 860 (2005).

Applicability.

Where counsel was appointed by the court below and his client is indigent, the proper motion in such cases should be filed in accordance with the requirements of this rule. *Moore v. State*, 297 Ark. 296, 761 S.W.2d 894 (1988) (decision under prior rule).
Defendant counsel’s petition for payment of attorney fees for his work on defendant’s appeal, despite his employment as a full-time public defender, was denied because subsection (c) of this rule applies only to appointed counsel not otherwise paid, and RAP-Crim 16 requires all counsel to represent defendants through their direct appeal unless relieved. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000).
When considered with the relevant public-defender statutes, it is evident that the reference to appointed counsel in subsection (c) of this rule is to attorneys not otherwise compensated for their representation. *Rushing v. State*, 340 Ark. 84, 8 S.W.3d 489 (2000).

Defendant's Burden.

The burden of establishing indigency is on the defendant claiming indigent status, and the defendant who seeks indigent status is responsible for verifying the motion to proceed as a pauper with a supporting affidavit. *Hill v. State*, 304 Ark. 348, 802 S.W.2d 144 (1991) (decision under prior rule).

Denial of Motion.

Motion to proceed in forma pauperis will be denied upon a finding that the defendant is not indigent and has funds available to him. *Maulding v. State*, 292 Ark. 102, 727 S.W.2d 855 (1987) (decision under prior rule).

Motion Granted.

Trial court lacked jurisdiction to relieve trial counsel and appoint appellate counsel after the notice of appeal had been filed. When trial counsel properly filed a motion to withdraw with the state supreme court and appellant filed a motion to proceed in forma pauperis along with his affidavit of indigency pursuant to this rule, the state supreme court made a finding of indigency and granted both motions. *Vinson v. State*, 373 Ark. 118, 281 S.W.3d 746 (2008).

Noncompliance.

Petition to proceed as a pauper failed to comply with this rule. *Burns v. Lockhart*, 293 Ark. 514, 738 S.W.2d 423 (1987); *Coble v. Lockhart*, 293 Ark. 515, 739 S.W.2d 164 (1987) (preceding decisions under prior rule).

Timeliness.

Where the attorney gave no reason for the delay beyond time limitations of this rule in filing the motion for attorney's fees, the motion was untimely. *Williams v. State*, 42 Ark. App. 184, 854 S.W.2d 370 (1993), overruled *Bell v. State*, 326 Ark. 1097, 935 S.W.2d 539 (1996).

Failure to comply with the thirty-day requirement in subsection (c) of this rule precludes counsel's entitlement to an award of attorney's fees; the fact that the appellate court may issue directions for a hearing at the same time that the mandate is issued does not affect the deadline. *Bell v. State*, 326 Ark. 1097, 935 S.W.2d 539 (1996).

Subsection (c) of this rule permits an attorney for an indigent criminal defendant to move the Supreme Court for attorney's fees within 30 days from the date of the mandate's issuance; it is evident that, if the Court lacked jurisdiction to consider motions for attorney's fees filed after the issuance of the mandate, subsection (c) would be meaningless. *Jones v. Jones*, 327 Ark. 195, 938 S.W.2d 228 (1997).

Cited: *Huggins v. State*, 305 Ark. 392, 807 S.W.2d 660 (1991); *Huggins v. State*, 304 Ark. 505, 803 S.W.2d 544 (1991); *Johnson v. State*, 46 Ark. App. 318, 880 S.W.2d 319 (1994) (preceding decisions under prior rule); *Emery v. State*, 341 Ark. 193, 15 S.W.3d 672 (2000); *Johnson v. State*, 368 Ark. 676, 249 S.W.3d 791 (2007); *Sparacio v. State*, 372 Ark. 114, 270 S.W.3d 840 (2008).

Rule 6-7. Taxation of costs.

(a) *Affirmance.* The appellee may recover brief costs not to exceed \$3.00 per page; total costs not to exceed \$500.00.

(b) *Reversal.* The appellant may recover (1) brief costs not to exceed \$3.00 per page with total costs of the brief not to exceed \$1000.00, (2) the filing fee of \$150.00 and the technology fee of \$15.00, (3) the circuit clerk's costs of preparing the record, and (4) the court reporter's cost of preparing the transcript.

(c) *Affirmed in part and reversed in part.* The Court may assess appeal costs according to the merits of the case.

(d) *Imposing or withholding costs.* Whether the case be affirmed or reversed, the Court will impose or withhold costs in accordance with Rule 4-2(b). (Amended June 7, 2001, effective July 1, 2001; amended May 25, 2006; amended September 24, 2009; amended June 2, 2011, effective July 1, 2011.)

Publisher's Notes. In a Per Curiam of April 21, 1980, the Supreme Court stated: "Attorneys representing indigent persons in appeals to this court are requested to file motions for allowance of attorney's fees and expenses within 15 days after a mandate has been issued in the case. The motion should be accompanied by an affidavit stating the time

spent in connection with the appeal, an itemization and explanation of all expenses incurred and a disclosure of any unusual problems in connection with the appeal. Motions not filed within 30 days of the issuance of a mandate will not be considered.

"It is extremely important that motions for payment of fees for services completed in a

fiscal year be acted upon before the end of that fiscal year (June 30) because payment out of the appropriation for a fiscal year after the expiration of that year is at least subject to question. It is also doubtful that payment for services rendered in one fiscal year can be paid from the appropriation for the next fiscal year."

Explanatory Note. The fee for filing an appeal increased to \$150.00 on July 31, 2007. The Rule is amended to reflect this increase.

Explanatory Note, 2011 Amendment: Ark. Code Ann. § 21-6-416 added a technology fee to be charged by the clerk of the Supreme Court, and it may be recovered as a cost.

CASE NOTES

ANALYSIS

Affirmance.

Attorney's fees.

Costs determined by appellate court.

Costs determined by trial court.

Reversal.

Substantial recovery.

Affirmance.

Notwithstanding appellant's assertion that additional record designated by appellees was unnecessary and that appellees should be required to pay the costs of the supplemental transcript, where court affirmed the appeal, appellant's request was denied in accordance with subsection (a) of this rule. *Sanders v. County of Sebastian*, 324 Ark. 433, 922 S.W.2d 334 (1996).

In a family's civil suit against poultry producers, the producers were entitled to briefing costs on appeal pursuant to this rule because the supreme court had previously affirmed the circuit court's ruling in the producers' favor on the issue of expert testimony. *Green v. Alphaarma, Inc.*, 374 Ark. 146, 286 S.W.3d 677 (2008).

Attorney's Fees.

The court would not award attorney's fees to the appellant, notwithstanding that she prevailed on important points of appeal, where there were other points on which she did not prevail, she submitted no invoices or hourly fee figures on which to calculate attorney's fees, and she submitted a repetitious and otherwise excessive abstract of the record. *Skokos v. Skokos*, 333 Ark. 396, 968 S.W.2d 26 (1998).

In a class action proceeding, the bank was arguing on appeal that the partial summary-judgment order entered in the circuit court was final even though no damages had been awarded, while at the same time arguing in the circuit court that no final order had been entered; although the bank eventually conceded that the partial summary-judgment order was not final, the bank failed to show good cause against the entry of sanctions in the form of costs and attorney fees. *United States Bank, N.A. v. Milburn*, 352 Ark. 144, 100 S.W.3d 674 (2003).

Costs Determined by Appellate Court.

Pursuant to subsection (c) of this rule, appeal costs were assessed to address appellees' motion seeking \$3,198.80 in costs and attorney's fees incurred for supplementing appellants' abstract and addendum and to reflect the decision on the merits, in that both parties prevailed in part on appeal. *Heflin v. Brackelsberg*, 2010 Ark. App. 261, — S.W.3d —, 2010 Ark. App. LEXIS 256 (Mar. 17, 2010).

Costs Determined by Trial Court.

Under subsection (d) of the former rule, Supreme Court could decide the liability for the costs to be borne by the parties, but the determination of exact amount might properly be left to the trial court. *Hogue v. Hogue*, 250 Ark. 102, 464 S.W.2d 67 (1971) (decision under prior rule).

Reversal.

Upon reversal of a case, costs were assessed in favor of the prevailing party under subsection (b) of the former rule. *Ross v. Patterson*, 308 Ark. 101, 821 S.W.2d 785 (1992) (decision under prior rule).

Substantial Recovery.

Appellant would recover costs pursuant to this rule where, although judgment in the main was affirmed, trial court erred in awarding attorney's fees to appellee. *Fireman's Fund Ins. Co. v. Clark*, 253 Ark. 1025, 490 S.W.2d 447 (1973).

Appellate court declined to award country club members costs pursuant to this rule as they would be entitled to only a paltry sum under subsection (a) of this rule, the court failed to see how the merits of the breach of contract case would warrant an award of costs under subsection (c) of this rule, and the members did not comply with Rule 4-2(b) to recover costs under subsection (d) of this rule; however, an award of fees under § 16-22-308 was appropriate. *Millwood-RAB Mktg., Inc. v. Blackburn*, 95 Ark. App. 253, 236 S.W.3d 551 (2006).

Cited: *Vandiver v. Washington County*, 274 Ark. 561, 628 S.W.2d 1 (1982), questioned *Cox v. Commissioners of Maynard Fire Improv. Dist. No. 1*, 287 Ark. 173, 697 S.W.2d 104 (1985), criticized *North Little Rock v. Graham*, 278 Ark. 547, 647 S.W.2d 452 (1983); *Gautrau v. Long*, 271 Ark. 394, 609 S.W.2d

107 (1980); *Bosnick v. Lockhart*, 283 Ark. 209, 677 S.W.2d 292 (1984); *Grable v. Grable*, 307 Ark. 410, 821 S.W.2d 16 (1991); *Crow v. Weyerhaeuser Co.*, 41 Ark. App. 225, 852 S.W.2d 334 (1993) (preceding decisions under prior rule); *Roberts v. Priest*, 335 Ark. 261, 979 S.W.2d 93 (1998); *Newcourt Fin., Inc. v. Canal Ins. Co.*, 341 Ark. 452, 17 S.W.3d 83 (2000); *Green v. Alpharma, Inc.*, 374 Ark. 67, 285 S.W.3d 665 (2008).

Rule 6-8. Certification of questions of Law.

(a) *Power to Answer.*

(1) The Supreme Court may, in its discretion, answer questions of law certified to it by order of a federal court of the United States if there are involved in any proceeding before it questions of Arkansas law which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.

(2) The Supreme Court shall decide whether to answer the question so certified within 30 days of the filing of the certification order. The Clerk shall mail notice of this decision to the certifying court, counsel of record, and parties appearing without counsel. The notice shall also state whether portions of the record, if any, are to be filed pursuant to subdivision (d) of this rule, as well as the briefing schedule and the approximate date the question certified will come before the Supreme Court for consideration.

(3) If the Supreme Court takes no action within 30 days of the filing of the certification order, the Court shall be deemed to have declined to answer the question unless it has by order extended the time.

(4) If the certification order is filed when the Supreme Court is formally in recess, the 30-day time period shall commence when the Court returns from the recess.

(5) In its discretion, the Supreme Court may at any time rescind its decision to answer a certified question. The Clerk shall promptly mail notice to the certifying court, counsel of record, and parties appearing without counsel.

(b) *Method of invoking.* This rule may be invoked upon motion of a federal court of the United States or upon motion of any party to the cause pending before the court.

(c) *Contents of certification order.*

(1) A certification order shall contain: (A) the question of law to be answered; (B) the facts relevant to the question, showing fully the nature of the controversy out of which the question arose; (C) a statement acknowledging that the Supreme Court, acting as the receiving court, may reformulate the question; and (D) the names and addresses of counsel of record and parties appearing without counsel.

(2) If the parties cannot agree upon a statement of facts, the certifying court shall determine the relevant facts and state them as a part of its certification order.

(d) *Preparation of certification order.* The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the clerk of the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or any portion of the record before the certifying court to be filed if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) *Costs of certification.* Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its certification order.

(f) *Briefs and argument.* Proceedings in the Supreme Court shall be those provided in these rules.

(g) *Opinion.* The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties.

(h) *Power to certify; Procedure.* The Supreme Court or the Court of Appeals, on their own motion or the motion of any party, may order certification of questions of law to the highest court of any other state when it appears to the Supreme Court or the Court of Appeals that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending and that there are no controlling precedents in the decisions of the highest court of the receiving state. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state. (Adopted January 24, 2002.)

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Logan, Certifying Questions to the Arkansas Supreme Court: A Practical Means for Federal Courts

in Clarifying Arkansas State Law, 30 U. Ark. Little Rock L. Rev. 85.

CASE NOTES

In General.

The Supreme Court of Arkansas will accept a certified question submitted by a federal court under the provisions of this rule only where all facts material to the question of law to be determined are undisputed and there are special and important reasons therefore, including, but not limited to, any of the following: (1) the question of law is one of first impression and is of such substantial importance as to require a prompt and definitive response by the court; (2) the question of law is one with respect to which there are conflicting decisions in other courts; or (3) the question of law concerns an unsettled issue of the constitutionality of a statute of the State of Arkansas. Longview Prod. Co. v. Dubberly, 352 Ark. 207, 99 S.W.3d 427 (2003).

Issuance of an opinion by the Supreme Court of Arkansas in response to a question certified to the Court by a federal court pursuant to this rule does not constitute the issuance of an advisory opinion as long as the Court addresses only issues that are truly contested by the parties and are presented on a factual record and the court's opinion on the

certified question will be dispositive on the issue and be res judicata between the parties. Longview Prod. Co. v. Dubberly, 352 Ark. 207, 99 S.W.3d 427 (2003).

Based upon responses from questions certified to the Arkansas Supreme Court pursuant to this rule, the federal district court found that § 5-68-502 effectively stifled the access of adults and older minors to communications and material they were entitled to receive and view under U.S. Const., Amendments I and XIV. Shipley, Inc. v. Long, 454 F. Supp. 2d 819 (E.D. Ark. 2004).

At its discretion under subdivision (a)(1) of this rule, the Supreme Court of Arkansas elected to settle an issue raised in a certified question from a federal court, even though the parties settled the underlying case and the issue was moot because the established precedent would prevent future litigation. Medical Liab. Mut. Ins. Co. v. Alan Curtis Enters., 373 Ark. 525, 285 S.W.3d 233 (2008).

Cited: Douglas v. First Student, Inc., 2011 Ark. 463, — S.W.3d —, 2011 Ark. LEXIS 547 (Nov. 3, 2011).

Rule 6-9. Rule for appeals in dependency-neglect cases.

(a) *Appealable Orders.*

(1) The following orders may be appealed from dependency-neglect proceedings:

(A) adjudication order;

(B) disposition, review, no reunification, and permanency planning order if the court directs entry of a final judgment as to one or more of the issues or parties based upon the express determination by the court supported by factual findings that there is no just reason for delay of an appeal, in accordance with Ark. R. Civ. P. 54(b);

(C) termination of parental rights;

(D) denial of right to appointed counsel pursuant to Ark. Code Ann. § 9-27- 316(h); and

(E) denial of a motion to intervene.

(2) The circuit court shall enter and distribute to all the parties all dependency-neglect orders no later than thirty (30) days after a hearing.

(b) *Notice, Indigency, and Time for Appeal.*

(1) The notice of appeal shall be filed within twenty-one (21) days following the entry of the circuit court order from which the appeal is being taken.

(A) If the court announces its ruling from the bench and an appellant files a notice of appeal prior to the entry of the order, it shall be deemed to be filed the day after the order is entered.

(B) The notice of appeal and designation of record shall be signed by the appellant, if an adult, and appellant's counsel. The notice shall set forth the party or parties initiating the appeal, the address of the parties or parties, and specify the order from which the appeal is taken.

(2) If the appellant alleges indigency for purpose of the appeal, the appellant shall file a motion, with notice to all parties, to request an indigency determination within fourteen (14) days following the entry of the order from which the appeal is taken.

(A) If the appellant has had a court determination of indigency prior to the hearing from the order from which the appeal is taken, the appellant shall seek a re-determination of indigency for purpose of appeal and shall submit a new affidavit for the court to determine indigency for the purpose of appeal.

(B) The circuit court shall rule on appellant's indigency motion within five (5) days of the indigency motion being filed. If the court conducts a hearing on the indigency motion, the judge may conduct the indigency hearing outside of the county and by teleconference. The court shall use the federal poverty guidelines provided by the Administrative Office of the Courts in making its indigency determination.

(C) If the appellant is determined indigent for purpose of appeal, the notice shall indicate that the court has made a determination of indigency for payment of the record. Trial counsel for indigent parents or custodians shall not be relieved as counsel for purpose of appeal until relieved by the Public Defender Commission as provided in Rule 6-10(c). If appellant is determined not indigent, appellant shall state that arrangements for payment of the record have been made.

(3) If a timely notice of appeal is filed, any other party may file a notice of cross-appeal and designation of record within five (5) days from receipt of the notice of appeal.

(4) The time in which to file a notice of appeal or a notice of cross-appeal and the corresponding designation of record will not be extended.

(5) In computing time periods in Rule 6-9, Ark. R. Civ. P. Rule 6(a), which provides in part that when the period of time prescribed or allowed is less than fourteen (14) days, intermediate Saturdays, Sundays, or legal holidays shall be excluded in the computation, shall apply.

(c) *Record on Appeal.*

(1) The record for appeal shall be limited to the transcript of the hearing from which the order on appeal arose, any petitions, pleadings, and orders relevant to the hearing from which the order on appeal arose, all exhibits entered into evidence at that hearing, and all orders entered in the case prior to the order on appeal.

(2) The appellant and the cross-appellant, if any, shall (A) complete a Notice of Appeal (Cross-Appeal) and Designation of Record (Form 1); (B) file Form 1 with the Circuit Clerk; and (C) serve Form 1 on the court reporter and all parties by any form of mail which requires a signed receipt.

(3) The designation-of-record portion of Form 1 shall identify the hearing from which the order being appealed arose, and shall designate the date(s) of the hearing resulting in the order being appealed. Service of the Notice of Appeal and Designation of Record (Form 1) shall constitute a request for transcription of the hearing from which the order of the appeal arose.

(4) Within five (5) days after receipt of the Notice of Appeal and Designation of Record (Form 1), the court reporter shall file a statement by mail or fax with the Circuit Clerk indicating whether arrangements for payment have been made and that the record will be completed timely. The court reporter shall make arrangements for the record to be completed and certified within sixty (60) days.

(d) *Transmission of Record.* Absent extraordinary circumstances, the record on appeal shall be filed with the Clerk of the Supreme Court within seventy (70) days of the filing of the Notice of Appeal. Within sixty (60) days after the filing of the Notice of Appeal and Designation of Record (Form 1), the court reporter shall provide the record to the Circuit Clerk who shall have no longer than five (5) days to prepare the record, including any transcripts and exhibits, to be transmitted for submission to Clerk of the Supreme Court. After the record has been duly certified by the Circuit Clerk, it shall be the responsibility of the appellant to transmit the record to the Clerk of the Supreme Court for filing.

(e) *Petition on Appeal.*

(1) Within thirty 30 days after transmission of the record to the Clerk of the Supreme Court, the appellant shall file an original and 16 copies of a Petition on Appeal (Form 2).

(2) The petition shall not exceed twenty (25) pages, excluding the abstract and addendum, and shall include:

(A) A statement of the nature of the case and the relief sought;

(B) A concise statement of the material facts as they relate to the issues presented in the petition on appeal that is sufficient to enable the appellate court to understand the nature of the case, the general fact situation, and the action taken by the circuit court. This statement must also summarize the circuit court order appealed from and recite the date the order was entered. (References to pages in the abstract and addendum are required.);

(C) An abstract or abridgment of the transcript that consists of an impartial condensation of only such material parts of the testimony of the witnesses and colloquies between the court and counsel and other parties as are necessary to an understanding of all questions presented to the court for

decision. In the abstracting of testimony, the first person (i.e., "I") rather than the third person (i.e., "He, She") shall be used. Not more than one page of the transcript shall in any instance be abstracted without a page reference to the record.

(D) A concise statement of the legal issues presented for appeal, including a statement of how the issues arose; and a discussion of the legal authority on which the party is relying with citation to supporting statutes, case law, or other legal authority for the issues raised. Citations of decisions of the court which are officially reported must be from the official reports. All citations of decisions of any court must state the style of the case and the book and page in which the case is found. If the case is also reported by one or more unofficial publishers, these should also be cited, if possible.

(E) Following the signature and certificate of service, the appellant's petition shall contain an addendum which shall include true and legible photocopies of the order, judgment, decree, ruling, or letter opinion from which the appeal is taken, a copy of the notice of appeal, and any other relevant pleadings, documents, or exhibits essential to an understanding of the case, which may include, but are not limited to, affidavits, petitions, case plan, court reports, court orders, or other exhibits entered into the record during the hearing from which the appeal arose, and all orders entered in the case prior to the order on appeal. The addendum shall include an index of its contents and shall also designate where any item appearing in the addendum can be found in the record.

(f) *Response to Petition on Appeal or Cross Appeal.*

(1) Within twenty (20) days after filing of the appellant's petition on a petition on appeal, any appellee may file an original and sixteen (16) copies of a response to the petition on appeal or cross-appeal (Form 3).

(2) The response shall not exceed twenty (25) pages, excluding the abstract and addendum and shall include:

(A) A concise statement of the material facts as they relate to the issues presented by the appellant, as well as the issues, if any, being raised by the appellee on cross-appeal, that is sufficient to enable the appellate court to understand the nature of the case, the general fact situation, and the action taken by the circuit court. (References to pages in the abstract and addendum are required.)

(B) A concise response to the legal issues presented on appeal and cross-appeal, if any, including a statement of how the issue arose; a discussion of the legal authority on which the party is relying with citation to supporting statutes, case law, or other legal authority for the issues raised. Citations of decisions of the court which are officially reported must be from the official reports. All citations of decisions of any court must state the style of the case and the book and page in which the case is found. If the case is also reported by one or more unofficial publishers, these should also be cited, if possible.

(C) If the appellee considers the appellant's abstract or addendum to be defective or incomplete, the appellee may provide a supplemental abstract or addendum. The appellee's addendum shall only include an item which the appellant's addendum fails to include.

(3) The appellant will have ten (10) days after appellee's response or petition on cross appeal is filed to reply to the response or the petition on cross appeal. If appellee files a petition on cross appeal and the appellant

has filed a response to the petition on cross appeal, the appellee will have ten (10) days to reply to appellant's response to the petition on cross appeal.

(g) *Extensions.* The Clerk of the Supreme Court shall have the authority to grant one (1) seven-day extension for completion of the record and one (1) seven-day extension to any party to the appeal to file the petition or the response to the petition. The extension shall be computed from the date the petition or response was originally due. Absent extraordinary circumstances, no other extensions shall be granted.

(h) *Style of Petition.* The style of the Petition on Appeal, Response, and Cross-Appeal shall follow the style of briefs as described by Rule 4-1 of the Rules of the Supreme Court except where a style is specifically described by these rules. Reference to any minor in the Notice of Appeal, Notice of Cross Appeal, Petition for Appeal, Petition for Cross Appeal, and responses shall be by the minor's initials. Other parties seeking anonymity shall comply with Rule 6-3 of the Rules of the Supreme Court and Court of Appeals.

(i) *Procedure for No-Merit Petitions, Pro Se Points, and State's Response.*

(1) After studying the record and researching the law, if appellant's counsel determines that the appellant has no meritorious basis for appeal, then counsel may file a no-merit petition and move to withdraw. In addition to the requirement set forth in subsection (e), counsel's no-merit petition must include the following:

(A) The argument section of the petition shall list all adverse rulings to the appellant made by the circuit court on all objections, motions, and requests made by the party at the hearing from which the appeal arose and explain why each adverse ruling is not a meritorious ground for reversal.

(B) The abstract and addendum shall contain all rulings adverse to the appellant, made by the Circuit Court at the hearing from which the order of appeal arose.

(2) Appellees are not required to, but may, respond to a no-merit petition. Appellees may file a concurrence letter supporting the no-merit petition. Any response by an appellee shall be filed within twenty (20) days of the filing of the no-merit petition.

(3) The Clerk of the Supreme Court shall mail the appellant, at the appellant's last known address, a copy of the no-merit petition and the motion to withdraw. The Clerk shall notify the appellant in writing that the appellant may raise any points that the appellant chooses and that these points may be typewritten or hand-printed. The Clerk shall also notify the appellant that the points shall be received by the Supreme Court Clerk by mail or other method of delivery within thirty (30) days from the date the Clerk mailed the appellant the notification.

(4) The Clerk shall provide appellant's points by electronic transmission or other method of delivery to the Department of Human Services — Office of Chief Counsel, the Attorney Ad Litem, and appellant's counsel within three (3) business days.

(5) Appellees are not required to respond to appellant's points; however, appellees may do so by filing such response within twenty (20) days of receipt by the Clerk of the Supreme Court of the appellant's points.

(j) *Ruling.*

(1) Dependency-neglect proceedings shall be prioritized on the calendar of the appellate court. Once a case is ready for submission, the Clerk of the Supreme Court shall submit the case for decision.

(2) If a party files a petition for rehearing with the appellate court or petition for review with the Supreme Court, it shall be filed within ten (10) calendar days of the appellate court's decision and the response shall be filed within ten (10) calendar days of the filing of the petition. A petition for rehearing shall comply with Rule 2-3 and a petition for review shall comply with Rule 2-4 of the Rules of the Supreme Court and Court of Appeals in all respects, except for the number of days for filing. No supplemental briefs or extensions shall be allowed. The Clerk of the Supreme Court shall submit the petition for decision. (Adopted May 18, 2006, effective July 1, 2006; amended September 25, 2008; amended October 29, 2009, effective January 1, 2010; amended June 3, 2010, effective July 1, 2010; amended June 2, 2011, effective July 1, 2011.)

Publisher's Notes. The forms specified in Rule 6-9 will be made available by the Administrative Office of the Courts and will be accessible on the Supreme Court's website: <http://www.courts.state.ar.us>.

Explanatory Note, 2011 Amendment: The amendment adds denial of a motion to intervene in dependency-neglect proceedings to the list of appealable orders under the expedited appeal procedure of Rule 6-9.

CASE NOTES

ANALYSIS

Appealable orders.
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Appealable Orders.

A mother's appeal from an order in a dependency-neglect case granting permanent custody of her children to their father was an appeal from a final, appealable order under Ark. R. App. P. Civ. 2(d) because Rule 2(d) applied to permanent custody orders in dependency-neglect cases, and, thus, there was no direct conflict with this rule as (1) this rule did not state that permanent custody orders were not final, appealable orders or that an Ark. R. Civ. P. 54(b) certificate was necessary for a permanent custody order relative to one child to be appealable, (2) Rule 2(d) specifically stated that custody orders were final, appealable orders; and (3) a Rule 54(b) certificate was not required under this rule for an appeal of the order regarding the two children in question. *West v. Ark. Dep't of Human Servs.*, 373 Ark. 100, 281 S.W.3d 733 (2008).

In termination proceedings, when a circuit court found the allegations against a mother in a petition by the Department of Human Services were substantiated by the proof, in accordance with § 9-27-327(a)(1), but because the mother did not appeal from the adjudication order, even though she could have done so under subdivision (a)(1)(A) of

this rule, the circuit court's findings in the order were no longer open to challenge by the mother and precluded from review. *Porter v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 342, — S.W.3d —, 2011 Ark. App. LEXIS 377 (May 11, 2011).

Belated Appeal.

Mother's motion for a belated appeal of an order terminating her parental rights was granted where the original notice of appeal, which was timely under subdivision (b)(2) of this rule, was not signed by the mother, as required by subdivision (b)(2)(D) of this rule; it was plain that there was error on the part of the mother's attorney. *Smith v. Ark. Dep't of Health & Human Servs.*, 371 Ark. 425, 266 S.W.3d 694 (2007).

Pursuant to subdivision (b)(2) of this rule, the father's notice of appeal of an order terminating his parental rights was required to be filed no later than May 5, 2008, but it was not filed until the next day. Because the father's motion to file a belated notice of appeal was filed well within the 18 months of the date of the entry of judgment as prescribed by Ark. R. App. P. Crim. 2(e), and the father's attorney candidly admitted fault, the court granted the motion. *Garcia v. Ark. HHS*, 374 Ark. 144, 286 S.W.3d 674 (2008).

Deficient Appeal.

Pursuant to subdivision (b)(2)(D) of this rule, because appellants' notice of appeal lacked the signature of each appellant, as well as the signature for each appellant's counsel, it was deficient; therefore, appellants' attorneys' motion for belated appeal was granted. *Martin v. Ark. HHS*, 369 Ark. 477, 255 S.W.3d 830 (2007).

Dismissal of Appeal.

Court granted parents' motion for a belated appeal after their record was refused due to their notice of appeal's noncompliance with subdivision (b)(2)(D) of this rule because it was plain that there was error on the part of the parents' counsel who admitted that it was his fault that the parents failed to sign the original notice of appeal, and subdivision (b)(2)(D) of this rule was clear that the notice of appeal and designation of the record should be signed by appellant, if an adult, and appellant's counsel. *S.F. v. Ark. HHS*, 370 Ark. 475, 261 S.W.3d 462 (2007).

While a father's addendum was lacking in his appeal of an order terminating his parental rights, the court declined to dismiss the appeal under subdivision (e)(2)(E) of this rule because supplemental addenda were filed by the Arkansas Department of Health and Human Services and the attorney ad litem, containing some of the relevant exhibits and orders. *Smith v. Ark. HHS*, 100 Ark. App. 74, 264 S.W.3d 559 (2007).

Mother's appeal of an order terminating her parental rights to her child was dismissed because she failed to appeal from an earlier order terminating her parental rights based on her consent; the mother failed to appeal within 21 days of the entry of the earlier order, as required by subdivision (a)(1)(C) of this rule. *Faas v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 666, — S.W.3d —, 2011 Ark. App. LEXIS 704 (Nov. 2, 2011).

Frivolous Appeal.

Where the father was arrested while driving to obtain opiates with his three-year-old, he failed to comply with the court's order to maintain stable housing, completing counseling, and submit to random drug screens; his appeal of the order terminating his parental rights under § 9-27-341(b)(3)(B)(i)(a) was frivolous. While counsel's no-merit brief filed pursuant to this rule did not address the trial court's denial of the father's motion to continue the termination hearing, counsel's discussion of the termination ruling covered the adverse ruling on the motion for a continuance; a re-briefing was not required, and counsel was permitted to withdraw representation. *Loe v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 607, — S.W.3d —, 2009 Ark. App. LEXIS 775 (2009).

As an appeal of a decision to terminate a father's parental rights over his child would have been wholly frivolous, his counsel's motion to withdraw from further representation pursuant to subsection (i) of this rule had merit. *Cariker v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 574, — S.W.3d —, 2011 Ark. App. LEXIS 617 (Sept. 28, 2011).

In a termination of parental rights proceeding, a motion to withdraw filed by the mother's counsel was granted pursuant to subdivi-

sion (i)(1) of this rule because a challenge to the sufficiency of the evidence to support the termination of her parental rights would be without merit. *Cheney v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 209, — S.W.3d —, 2012 Ark. App. LEXIS 311 (Mar. 14, 2012).

No-Merit Petitions.

Trial court properly found that termination of parental rights was in the child's best interest and that grounds existed pursuant to § 9-27-341(b)(3)(B)(i)(a), (ii)(a) and (vii)(a). Therefore, the parents' attorney was relieved as counsel pursuant to subsection (i) of this rule, because counsel had complied with the requirements regarding no-merit appeals and the appeal was wholly without merit. *Davis v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 872, — S.W.3d —, 2009 Ark. App. LEXIS 1024 (2009).

In an appeal from a termination of parental rights proceeding in which the mother's counsel filed a no-merit brief pursuant to the Linker-Flores decision and subsection (i) of this rule, there had been full compliance with subsection (i) and the appeal was without merit. The appellate court determined that the trial court's order to terminate the mother's parental rights was not clearly erroneous, and the mother's counsel discussed the other rulings made by the trial court and explained why they would not support a meritorious appeal; the appellate court agreed with the mother's counsel. *Gossett v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 240, — S.W.3d —, 2010 Ark. App. LEXIS 228 (Mar. 10, 2010).

Pursuant to subsection (i) of this rule, there were no meritorious arguments for reversal of a trial court's termination of a mother's parental rights, as the clear and convincing evidence supported such decision; accordingly, the mother's attorney was permitted to withdraw from further representation upon complying with the filing of a no-merit brief requirement. *Watkins v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 467, — S.W.3d —, 2010 Ark. App. LEXIS 489 (June 2, 2010).

Counsel's motion to withdraw and affirm the trial court's adjudication of dependency-neglect was granted as the attorney had filed a no-merit brief asserting that there were no issues that would support a meritorious appeal and requesting to be relieved as counsel. Despite being given the opportunity to do so, the child's parents had filed no pro se points for reversal. *Duvall v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 261, — S.W.3d —, 2011 Ark. App. LEXIS 275 (Apr. 6, 2011).

Because a mother's appeal of the termination of her parental rights was wholly without merit, a motion to withdraw filed by the mother's attorney was appropriate under subdivision (i)(1) of this rule. *Harper v. Ark. Dep't*

of Human Servs., 2011 Ark. App. 280, — S.W.3d —, 2011 Ark. App. LEXIS 290 (Apr. 13, 2011).

Appellate court granted a motion to withdraw filed by a mother's counsel after the mother's parental rights were terminated; counsel complied with the requirements in subdivision (i)(1) of this rule for no-merit termination appeals by adequately discussing why there was no arguable merit to an appeal. *Padgett v. Ark. Dep't of Human Servs.*, 2012 Ark. App. 294, — S.W.3d —, 2012 Ark. App. LEXIS 407 (Apr. 25, 2012).

Record.

Where a father failed to include in the record all orders relevant to a parental rights termination hearing, the father failed to meet his burden of bringing up a proper record; therefore, the father's appeal of the circuit court's order terminating his parental rights was dismissed. *Busbee v. Ark. HHS*, 369 Ark. 416, 255 S.W.3d 463 (2007).

Reply Brief.

Supreme Court of Arkansas holds that the current rules for no-merit briefs in termination-of-parental-rights cases, Ark. Sup. Ct. R. 4-3(j) and this rule, do not expressly require the Arkansas Department of Health and Human Services to file a reply brief to a parent's pro se points on appeal. *Posey v. Ark. HHS*, 370 Ark. 500, 262 S.W.3d 159 (2007).

Signature Requirement.

In a termination of parental rights case, a motion for rule on clerk was treated as a belated appeal where a father's attorney admitted that she was at fault for failing to submit the appeal without a signature, in violation of subdivision (b)(2)(D) of this rule. *Hall v. Ark. HHS*, 371 Ark. 15, 262 S.W.3d 601 (2007).

After the entry of a dependency-neglect order, the father filed two unsigned notices of appeal that did not meet the requirements of subdivision (b)(1)(B) of this rule and a third, signed notice of appeal was timely. The Supreme Court of Arkansas denied the state's motion to dismiss and allowed the father to pursue a belated appeal, because expedition of the appellate process was a goal in dependency-neglect cases. *Ashcroft v. Ark. Dep't of Human Servs.*, 2009 Ark. 461, — S.W.3d —, 2009 Ark. LEXIS 617 (2009).

Foster parents' appeal from the denial of their motion to intervene in a dependency-neglect proceeding was a final order governed by Ark. R. App. P. — Civ. 2(a)(2), not this rule. Therefore, the foster parents' failure to sign the notice of appeal was not a fatal defect, and their appeal was not subject to dismissal. *Schubert v. Ark. Dep't of Human Servs.*, 2009 Ark. 596, 357 S.W.3d 458 (2009).

Termination of Parental Rights.

Father's appeal from the termination of his parental rights and from the granting to the Department of Health and Human Services the power to consent to adoption was improper because the father's brief did not comply with this rule in that the father's addendum failed to include any of the previous orders considered by the circuit court in its decision to terminate the father's parental rights. Thus, the father was provided with 15 days from the date of the supreme court's opinion in which to file a substituted brief, abstract, and addendum to cure the deficiencies, at his own expense, Ark. Sup. Ct. & Ct. App. R. 4-2(b)(3). *Posey v. Ark. HHS*, 370 Ark. 1, 256 S.W.3d 504 (2007).

When the children were removed from the home and adjudicated dependent based on physical abuse and parental unfitness due to drug use, the mother failed to maintain appropriate housing and employment, did not follow the recommendations of her psychological evaluation, or remain drug free. The trial court did not err by terminating her parental rights under § 9-27-341(b)(3)(B)(vii)(a); because the mother's appeal was frivolous, counsel's motion to withdraw was granted under subsection (i) of this rule. *McKellar v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 781, — S.W.3d —, 2009 Ark. App. LEXIS 941 (2009).

Termination of the mother's parental rights was affirmed because the evidence demonstrated that all of the children were likely to be adopted and that their welfare and safety would be jeopardized if returned to their mother's custody and the Arkansas Department of Human Services adequately proved the statutory grounds as found by the trial court. *Emmert v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 128, — S.W.3d —, 2010 Ark. App. LEXIS 124 (Feb. 11, 2010).

Cited: *Flannery v. Ark. HHS*, 368 Ark. 31, 242 S.W.3d 619 (2006); *Sparrow v. Ark. HHS*, 370 Ark. 371, 259 S.W.3d 419 (2007); *Ark. Dep't of Human Servs. v. Denmon*, 2009 Ark. 485, 346 S.W.3d 283 (2009); *Krass v. Ark. Dep't of Human Servs.*, 2009 Ark. App. 245, 306 S.W.3d 14 (2009); *Lipscomb v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 257, — S.W.3d —, 2010 Ark. App. LEXIS 258 (Mar. 17, 2010); *Barber v. Ark. HHS*, 2010 Ark. App. 381, — S.W.3d —, 2010 Ark. App. LEXIS 385 (May 5, 2010); *Johnson v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 763, — S.W.3d —, 2010 Ark. App. LEXIS 800 (Nov. 10, 2010); *Masterson-Heard v. Ark. Dep't of Human Servs.*, 2010 Ark. App. 623, — S.W.3d —, 2010 Ark. App. LEXIS 659 (Sept. 22, 2010); *Beeson v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 317, — S.W.3d —, 2011 Ark. App. LEXIS 341 (Apr. 27, 2011); *Jessup v. Ark. Dep't of Human Servs.*, 2011 Ark. App. 463, — S.W.3d —, 2011

Ark. App. LEXIS 500 (June 29, 2011); Landis-Maynard v. Ark. Dep't of Human Servs., 2011 Ark. App. 673, — S.W.3d —, 2011 Ark. App. LEXIS 726 (Nov. 9, 2011); Feters v. Ark. Dep't

of Human Servs., 2012 Ark. App. 152, — S.W.3d —, 2012 Ark. App. LEXIS 237 (Feb. 15, 2012).

Rule 6-10. Counsel's duties with regard to dependency-neglect appeals.

(a) Trial counsel shall explain to his/her client all rights regarding any possible appeal, including deadlines, the merits, and likelihood of success of an appeal.

(b) If appellant is indigent, trial counsel shall file a motion seeking an indigency determination for purpose of appeal with the Circuit Court and ensure that appellant has signed the notice of appeal pursuant to Rule 6-9.

(c) Trial counsel who represent indigent parents and custodians shall serve the Arkansas Public Defender Commission by electronic submission or other method of delivery a file-marked copy of the notice of appeal and the order or orders that are being appealed within three (3) business days of filing the notice of appeal with the Circuit Clerk.

(1) Trial counsel shall timely respond to all reasonable requests for information to the Arkansas Public Defender Commission for purpose of appeal. Trial counsel for indigent parents or custodians shall not be relieved as counsel for the purpose of appeal until the Public Defender Commission timely receives the properly filed notice of appeal, questionnaire, and the order(s) appealed.

(2) The Arkansas Public Defender Commission shall send confirmation of receipt to trial counsel. This confirmation shall operate to relieve trial counsel of representation of the client for the limited purpose of appeal, and no motion to be relieved will need to be filed with the appellate court.

(d) The Circuit Court shall retain jurisdiction of the dependency-neglect case and conduct further hearings as necessary. Trial counsel, whether retained or court-appointed, shall continue to represent his/her client in a dependency-neglect case in the Circuit Court throughout any appeal to the Arkansas Supreme Court or Arkansas Court of Appeals, unless permitted by the trial court to withdraw in the interest of justice or for other sufficient cause.

(e) After the notice of appeal is filed with the Circuit Court, the appellate court shall have exclusive jurisdiction to relieve counsel for the purpose of appeal, except as provided in subsection (c). All substitute counsel shall file an entry of appearance with the Clerk of the Supreme Court. (Adopted May 18, 2006, effective July 1, 2006; amended September 25, 2008.)

Publisher's Notes. In a per curiam opinion dated June 27, 2007, *In Re: Transfer of Appeals of Dependency-Neglect Cases to the Arkansas Public Defender Commission*, the Arkansas Supreme Court stated: "Rule 6-10(a) of the Rules of the Supreme Court and Court of Appeals provides that in dependency-neglect appeals, the appellate courts shall have exclusive jurisdiction to relieve appointed counsel and appoint new counsel after the notice of appeal has been filed with the Circuit Clerk. Effective July 1, 2007, the Arkansas Public Defender Commission shall serve as appellate counsel for parties found by

the Circuit Court to be indigent for purposes of appeal in dependency-neglect proceedings. Notwithstanding the transfer of these appeals to the Arkansas Public Defender Commission, it will continue to be the responsibility of trial counsel to file all notices of appeals in compliance with Arkansas Supreme Court Rule 6-9(b). It shall also be the responsibility of trial counsel to serve on the Arkansas Public Defender Commission within twenty-four (24) hours of filing the notice of appeal with the Circuit Clerk a file-marked copy of the notice of appeal and the order or orders that are being appealed. Service on the Ar-

kansas Public Defender Commission may be effectuated by electronic submission. Upon receipt of the notice of appeal and orders being appealed, the Arkansas Public Defender Commission shall send a confirmation of receipt to trial counsel. This confirmation

will operate to relieve trial counsel of representation of the client for the limited purpose of appeal, and no motion to be relieved as counsel need be filed with the appellate court.”

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RULES GOVERNING ADMISSION TO THE BAR

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- II. Time and place of examination.
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Appendix

Application regulations.

Rule I. Composition of board of law examiners.

The State Board of Law Examiners, (hereinafter Board), is hereby constituted, before whom all applicants for license must appear.

Said Board shall consist of eleven members: two from each Congressional District (as now or hereafter constituted), and the remainder from the State at large. Each appointment shall be for a term of six years, unless otherwise designated by the Supreme Court. Vacancies occurring from causes other than expiration of term of office will be filled by the Supreme Court as they occur, and the person so appointed shall serve the remainder of the term of his or her predecessor. The Board, from its members, shall annually select its own chair. Members shall continue to serve beyond their designated term until such time as their successor is qualified and appointed by the Court.

The Board, its individual members, Executive Secretary and employees and agents of the Board are absolutely immune from suit or action for their activities in discharge of their duties hereunder to the full extent of judicial immunity in Arkansas.

The Board may adopt regulations consistent with these rules, to be submitted to the Arkansas Supreme Court for approval prior to their implementation. Any regulations adopted by the Board and approved by the Court shall appear as an appendix to the Rules Governing Admission to the Bar. (Per Curiam February 10, 1969; adopted and amended May 18, 1992; amended July 17, 1995; amended September 16, 1996; amended September 30, 1999.)

Rule II. Time and place of examination.

The Board shall hold semiannual examinations of applicants to be given in the months of February or March and July or August of each year in Little Rock, or at other locations it may designate. The Board shall meet following each of said examinations for the purpose of grading examination papers and certifying the grades thereon. The grades on such examinations shall be certified to the Clerk of the Court within 45 days following the giving of the

examination, unless further investigation of moral or ethical character is deemed necessary by the Board; or, receipt of additional scores is required.

The Board may meet at such other times as it may designate to carry out its duties specified herein. (Per Curiam May 15, 1992; amended June 2, 1997.)

Rule III. Board records.

The activities, files and records of the Board shall be kept confidential except in the following instances:

- a. Public hearings required under these rules;
- b. The certification of names and addresses of all applicants who complete the examination and whether they have passed or failed the examination;
- c. Subsequent to the release of the bar examination results, the Secretary shall provide each examinee with his or her examination grades;
- d. When necessary for disbarment suit, or in defense of litigation brought against the Executive Secretary, the Board, or members of the Board;
- e. Such statistical data as the Board may maintain, protecting the identity of the individual applicant; and,
- f. The top examination paper in each subject shall be available for review in the Office of the Supreme Court Library and the libraries of any American Bar Association accredited law school in Arkansas, but the name of the author shall not be disclosed.
- g. The Board may provide pass/fail information, which may include applicant names, to the national entity which has been authorized by the United States Department of Education (Department) to collect such information in order to allow the Department, or its appointed agent, to determine whether law schools across the country have met "minimum passage" standards currently in effect or as they may be adopted in the future.

Records of the Arkansas State Board of Law Examiners shall be subject to the following records retention schedule:

1. Applications to take examination or seek admission on motion — shall be maintained for a period of ten (10) years and then shall be destroyed;
2. Fiscal records — shall be maintained for a period of ten (10) years and then shall be destroyed; and,
3. Lists of applicants and scores — the list of all individuals who actually take a given examination, along with statistical analyses which contain information on the scores obtained, and, all documentation concerning the conduct of the examination shall be maintained for a period of twenty-five (25) years and then shall be destroyed; and,

Any information furnished to the Board or its Executive Secretary in connection with any application shall be confidential unless the person furnishing that information waives its confidentiality in writing. Any proceeding at which the testimony of witnesses is being taken under oath shall be open to the public and all evidence considered by the Board at such a proceeding shall be public. (Per Curiam February 10, 1969; amended September 11, 1972; amended October 25, 1976; amended December 10, 1979; amended April 4, 1988; amended July 18, 1988; adopted and amended May 18, 1992; amended May 15, 1995; amended May 15, 2003; amended June 17, 2004; amended December 2, 2010.)

Rule IV. Duties of the Board.

The Board shall cause to be provided questions to be used on examinations, and shall furnish to each applicant a set of such questions, on the day of examination.

The Board shall cause to be graded the examination papers and as a Board ascertain the average grade of each applicant.

The names and addresses of applicants passing the examination as determined pursuant to Rule IX of these rules and who are otherwise eligible for admission in accord with Rule XIII of these rules; or, who are eligible for admission or reinstatement pursuant to Rule XVI or Rule VII of these rules; and who meet the requirements of Rule XIII of these rules, may be certified by the Executive Secretary to the Clerk of the Supreme Court, with a recommendation that they be licensed as attorneys-at-law. (237 Ark. 976, January, 1963, as amended April 8, 1963; amended October 25, 1976; amended July 1, 1985; amended May 18, 1992; amended February 1, 2001; amended September 6, 2001; amended June 17, 2004; amended October 9, 2008.)

Rule V. Duties of the clerk.

The Executive Secretary or the Clerk shall make available to each qualified applicant a petition for license and oath of office. Said petition, when properly executed and returned, shall be presented to the Clerk, where the order of enrollment will be made and license issued. (237 Ark. 976, January 1963; adopted and amended May 18, 1992.)

Rule VI. Duties of the applicant.

The applicant shall execute the petition and take the oath before some officer authorized by law to administer official oaths (a notary public cannot do so), and return the petition to the Clerk of the Supreme Court, together with such fees or dues as provided by law or Order of the Court. Each applicant for admission to the Bar is required to answer under oath a questionnaire on forms prescribed by the Board. Should any answer be false in a material respect, the application will be rejected if the fact is ascertained before enrollment; but if enrolled, such attorney is subject to disbarment. (237 Ark. 977, January 1963; adopted and amended May 18, 1992.)

Publisher's Notes. By Per Curiam delivered September 30, 1999, the Arkansas Supreme Court provided: "Act 960 of 1999 provides that the Supreme Court shall determine the amount of the fee to be paid by attorneys for enrolling and recording their licenses and furnishing them certified transcripts. These fees are deposited in the Supreme Court Li-

brary Fund for the purpose of maintaining and improving the Supreme Court Library.

"Historically, this fee was set by the General Assembly, but with the passage of the reference Act, it is now our responsibility. Accordingly, effective January 1, 2000, the fee for attorney enrollment is set at \$25.00."

Rule VII. Application for license.

Application for license to practice law, except for good cause shown, must be filed within one year from the date of recommendation; otherwise the applicant must submit to an examination by the State Board of Law Examiners for further recommendation.

A. **LICENSE FEE.** An annual license fee as set by the Court, from time to time, shall be imposed upon each attorney actively licensed to practice law in this State. The fee shall be paid annually to the Clerk of the Arkansas Supreme Court. The amount shall be payable January 1 of each year, and must be paid not later than March 1 of each year. Funds thus realized shall be used as ordered by the Supreme Court of the State of Arkansas.

Attorneys licensed in this State who have transferred to voluntary inactive status pursuant to Section 25 A.(7) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, or its' successor provision, shall pay fifty percent (50%) of the fee required of actively licensed attorneys.

B. **LICENSE DENIED.** No person shall be admitted to practice law in this State who has been disbarred or suspended from the practice of law in any other state, unless good cause is shown.

C. **SUSPENSION FOR FAILURE TO PAY FEE.** Failure to pay the annual license fee provided in subsection A of this Section shall automatically suspend the delinquent lawyer from the practice of law in Arkansas. Notice of delinquencies shall be given by the Clerk to the delinquent attorney, to the Judges of the Circuit Courts of the circuit of the delinquent attorney's residence and to the Executive Secretary. A list of all delinquent attorneys shall be posted in the office of the Clerk.

(1) Delinquency in a given year dates from March 2 of the year in which the fees are due.

(2) Where the delinquency is for three years or less, reinstatement may be had by the payment of all such delinquent dues, and a penalty of \$100.00. If delinquency is for more than three (3) years, application for reinstatement must be made on a form supplied by the Executive Secretary of the Board and accompanied by a tender of all unpaid dues and penalties as prescribed by the Clerk.

D. **REINSTATEMENT.** An application for reinstatement pursuant to C(2) of this Section for non-payment of dues for more than three (3) years shall be accompanied by the payment of an application fee of \$100.00 which shall be payable to the Board. All applications for reinstatement will be referred to the Board in accord with Rule XIII of these rules for investigation and recommendation and the taking of a new examination may be required by the Board.

E. **PUBLIC RECORDS.** It shall be the duty of the Clerk to maintain a public record of licensed attorneys in the state of Arkansas and a list of all attorneys no longer licensed and the reason therefore, e.g., deceased, suspended, disbarred, surrender of license, inactive, delinquency of fee, disabled or retired.

F. At the time of licensure, the new admittee shall provide a mailing address to the Clerk of this Court. The address on record with the Clerk shall constitute the address for service by mail. Attorneys shall be responsible for informing the Clerk in writing and within a reasonable time of any change of such address.

G. **ATTORNEY OATH OF ADMISSION.** The following oath shall be administered to and signed by members of the Arkansas Bar:

State of Arkansas)
In the Supreme Court)

To the Honorable, the Supreme Court of Arkansas:

Your petitioner prays to be licensed as an Attorney-at-Law.

I DO SOLEMNLY SWEAR OR AFFIRM:

I will support the Constitution of the United States and the Constitution of the State of Arkansas, and I will faithfully perform the duties of attorney at law.

I will maintain the respect and courtesy due to courts of justice, judicial officers, and those who assist them.

I will, to the best of my ability, abide by the Arkansas Rules of Professional Conduct and any other standards of ethics proclaimed by the courts, and in doubtful cases I will attempt to abide by the spirit of those ethical rules and precepts of honor and fair play.

To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.

I will not reject, from any consideration personal to myself, the cause of the impoverished, the defenseless, or the oppressed.

I will endeavor always to advance the cause of justice and to defend and to keep inviolate the rights of all persons whose trust is conferred upon me as an attorney at law.

ATTORNEY'S SIGNATURE

Sworn to and subscribed before me this _____ day of _____, 2_____.

OFFICIAL AUTHORIZED TO
ADMINISTER OATH

(237 Ark. 977, January 1963; adopted and amended May 18, 1992; amended May 3, 1993; amended September 6, 2001; amended June 17, 2004; amended February 2, 2006; amended January 1, 2007; amended February 23, 2012.)

Publisher's Notes. By Per Curiam Order dated November 1, 2001, the Supreme Court of Arkansas provided: "The annual license fees for the Bar of Arkansas were last increased commencing January 1995. *See In Re Bar of Arkansas License Fee*, 317 Ark. 686, 878 S.W. 2d 409 (1994). At that time, the base fee was increased to \$100.00 (\$75 for new enrollees and \$10 for attorneys over sixty-five years of age) in order to cover the five-year projected operational budget of the Bar of Arkansas [footnote: Bar of Arkansas budget includes: Office of Professional Programs, Continuing Legal Education Board, Board of Law Examiners, Committee on Professional Conduct, Committee on the Unauthorized Practice of Law, Lawyer Assistance Program, Client Security Fund, and general administrative expenses]. It is almost seven years

later, and our five-year projection has been met and more. The Court has again reviewed its existing and projected needs for the next five years, and in doing so, we considered ongoing expenses plus those new costs related to the implementation of the Arkansas Lawyer Assistance Program, restructure and expansion of the operations of the Office of Professional Conduct, and the need for additional resources for the Client Security Fund. These new and revised programs arose from the recommendations made by the Arkansas Bar Association, the American Bar Association, and individual members of the Bar. These reasons and others will be more thoroughly discussed below.

"While we remain in sound fiscal shape, the court will be required to increase license fees to assure it can meet increased expenses. We

intend to implement the fee increase in two phases. The first phase of the increase will not begin until January 1, 2003. While we announce the increase in license fees today, we are able to delay the implementation date of the first phase until January 1, 2003, by using our reserves. Our deficit for the 2000-2001 fiscal year was \$92,398. We can fund the increased expenses at the current license fee rates, by using our reserves, for approximately another year. At the end of that time, we project a deficit in excess of \$300,000, and our reserves will not have sufficient excess funds to fund an additional year.

"Because of this, we have determined that, commencing on January 1, 2003, the new fee schedule for the Bar of Arkansas should be as follows: The annual license fee shall be \$175.00 for lawyers who have been licensed for three or more years. The annual fee for new enrollees who have been licensed for less than three years shall be \$100.00. Lawyers who are sixty-five years of age or older on or before January 1 of the year for which license fees are payable may pay at the reduced rate of \$15.00 per year.

"Our financial projections indicate that the additional revenue generated by the phase-one increase will meet our financial obligations for five years. We project that we will begin to run a deficit in the 2006-2007 fiscal year. As a result, commencing January 1, 2008, the second phase of the fee increase will be implemented: The annual license fee shall increase from \$175.00 to \$200.00 for lawyers who have been licensed for three or more years. The annual fee for new enrollees who have been licensed for less than three years shall increase from \$100.00 to \$125.00. The reduced rate for lawyers who are sixty-five years of age or older on or before January 1 of the year for which license fees are payable shall increase from \$15.00 to \$20.00 per year. Our goal is for the phase-two fee schedule to be in place for at least five years.

"There are numerous factors necessitating this increase, but we want to outline the most compelling reasons and explain how the increased funds will be applied.

"1. At the recommendation of the Arkansas Bar Association and after considerable study, on December 7, 2001, we established the Arkansas Lawyer Assistance Program. *See In Re Establishment of the Arkansas Lawyer Assistance Program*, 343 Ark. Appendix (2000). This program assists lawyers and judges suffering from physical or mental disabilities. During phase one, thirteen dollars of each license fee (\$1.00 of the over sixty-five fee) will be allocated to this program. In phase two, the allocation will be fifteen dollars of each license fee (\$1.50 of the over sixty-five fee).

"2. The Client Security Fund exists to pro-

tect clients from losses caused by the misconduct of members of the Bar of Arkansas. Because of a lack of funds in recent years, it has been necessary to place a cap on eligible claims and to pay claims on a pro-rata basis. To ensure that this Fund has sufficient resources to compensate deserving clients, it is necessary to bolster the funding. During phase one, seventeen dollars of each license fee (\$1.50 of the over sixty-five fee) will be allocated to this Fund. In phase two, the allocation will be twenty dollars of each license fee (\$2 of the over sixty-five fee).

"3. Upon the recommendation of the Arkansas Bar Association, the American Bar Association Standing Committee on Professional Discipline examined the structure, operations, and procedures of our lawyer disciplinary system. On July 9, 2001, we announced amendments to the Procedures Regulating Professional Conduct of Attorneys at Law (effective January 1, 2002). *See In Re: Amendments to the Procedures Regulating Professional Conduct of Attorneys at Law*, 345 Ark. Appendix (2001). These changes in the structure of the Office of Professional Conduct and the Committee on Professional Conduct require a major increase in the financial support for the lawyer disciplinary system, including a new staff position for an investigator and salary raises for the legal staff and director. The system is funded from the annual license fees and resources have been added to the operational budget to meet these needs.

"4. Heretofore, bar account employees have not had a retirement program. These employees include the staffs of the Office of Professional Conduct and Office of Professional Programs. In 2000, we followed the recommendation of the American Bar Association and instituted this much needed employment benefit for these employees. To insure that the program is actuarially sound, it is necessary that sufficient resources exist in the bar account to make the required contributions to the program. The increase in license fees will permit such contributions.

"5. Besides these special programs, additional revenues are needed in order for the Court to provide adequate funding for the general administrative expenses of our various boards and committees, including: the Unauthorized Practice of Law Committee, the State Board of Law Examiners, and the Office of Professional Programs.

"For these reasons and others, we have concluded that the increase in the annual license fees which we announce today is necessary. As stated above, this new schedule of annual fees shall become effective January 1, 2003. If our financial projections are on track, we have set out a fee schedule to be in place for more than ten years."

By Per Curiam order Dated June 1, 2006, the Supreme Court of Arkansas provided: **"LICENSE FEE FOR SENIOR MEMBERS OF THE BAR.** Consonant with Rule VII. A. of the Rules Governing Admission to the Bar of Arkansas, in recent years we have issued several per curiam orders pertaining to the amount of the annual license fee. See: *In Re Bar of Arkansas License Fee*, 317 Ark Appendix 686, 878 S.W.2d 409 (1994); *In Re Bar of Arkansas License Fees*, a per curiam order entered November 1, 2001; and, *In Re: Penalty for Late Payment of Bar of Arkansas Dues*, a per curiam order delivered on November 21, 2002. In each of those orders, we have made a provision for a reduced fee for attor-

neys who are 65 years of age or older. The first of those per curiam orders, issued in 1994, required attorneys seeking the reduced fee to 'certify that their earnings do not exceed the amount that would prevent a person of their age from drawing the maximum social security benefits'. The most recent two per curiam orders do not contain that language. Beginning with the annual license fees due January 1, 2007, attorneys shall be entitled to the reduced annual license fee if they are age 65 or older and they certify that their primary source of income does not derive from the practice of law. The reduced fee shall be in the amount set in the per curiam orders of November 1, 2001 and November 21, 2002."

Rule VIII. Duties of the Executive Secretary.

The Board shall receive administrative and clerical support as provided by order of the Arkansas Supreme Court. If an individual is employed by the Court to provide such support, that person shall be known as the Executive Secretary of the Arkansas State Board of Law Examiners. Compensation for the Executive Secretary shall be set by the Court.

The duties of the Executive Secretary are purely ministerial. The Executive Secretary shall attend to all necessary correspondence of the Board and make available to applicants all needed information relative to admission to the Bar of Arkansas.

The Executive Secretary shall give such bond as may be required by the Board, and shall keep a faithful account of all fees collected and expenditures made; make a detailed report of same to the Board at each regular meeting; and shall perform such other duties as may be directed by the Board, or the Court. The Executive Secretary, with the advice and counsel of the Board, shall be authorized to develop and utilize appropriate forms, letters, and other documents to enhance efficient administration of the bar admission process. (237 Ark. 977, January 1963; adopted and amended by Per Curiam May 18, 1992; amended June 17, 2004.)

Rule IX. Examination — Subjects — Passing Grade.

A. GENERAL EXAMINATION

All examinations shall be in writing and may cover the subjects herein-after listed and such other subjects as the Board may direct, subject to prior Court approval.

BUSINESS ORGANIZATIONS

This subject heading may include corporations, partnerships, agency and master-servant relationships.

COMMERCIAL TRANSACTIONS

This subject heading may include the general coverage of the U.C.C. This will not include the general subject of contracts and will not include matters relating to warranties under product liability, both of which may be covered under other headings.

CRIMINAL LAW AND PROCEDURE

This subject heading may include constitutional law as it applies to criminal law and procedure.

CONSTITUTIONAL LAW

This subject heading may include both the Arkansas Constitution and the Constitution of the United States. This subject will not be primarily directed to matters relating to criminal law and procedure.

TORTS

This subject heading may include the entire field of Tort law and questions concerning product liability.

PROPERTY

This subject heading may include the law of real property and, or, personal property. Emphasis here should not be placed on the U.C.C. and other such questions arising primarily under the subject heading "Commercial Transactions."

WILLS, ESTATES, TRUSTS

Because of the broad scope of this subject heading, questions concerning taxation shall not be covered. Guardianship of both the person and the estate may be included.

EVIDENCE

PRACTICE AND PROCEDURE

This subject heading may include both state and federal trial and appellate practice and, where applicable, remedies and choice of forum.

EQUITY AND DOMESTIC RELATIONS

CONTRACTS

This subject heading should place emphasis upon the traditional basics of contract law. Only where duplication cannot be avoided, should matters such as the application of the Uniform Commercial Code be covered under this heading.

MULTISTATE PERFORMANCE TEST

The Multistate Performance Test (MPT) presents problems which arise in a variety of fields of law which include the subject area as set forth in the preceding paragraphs as well as other fields of law. However, materials provided with the examination provide sufficient substantive information to complete the task set forth in each MPT question.

NOTE: Conflict of Laws is not included as a separate subject on the examination. However, conflict questions may arise in the subjects included on the examination and should be recognized as such.

PASS/FAIL DETERMINATION

The answers to each essay question and each MPT question will be graded on a scale ranging from 65 through 85. This score shall be designated as the applicant's "raw" score on a question. The raw score on each MPT question will be multiplied by 1.5. The resulting products from the MPT questions will be added to the sum of the raw scores from the essay questions to yield a "total written raw" score.

The distribution of the total written raw scores acquired by applicants on a given examination will be converted to a score distribution that has the same mean and standard deviation as those same applicants' Multistate Bar Examination scale scores on that examination. The score on this converted scale that corresponds to the applicant's total written raw score shall be designated as the applicant's "written scale" score. An applicant's total examination score shall be determined by the following formula: total score = written scale score + MBE scale score. An applicant shall pass the examination if he or she earns a total score of 270 points or higher.

A bar examination applicant may retain a Multistate Bar Examination scale score of 135 or more. The retained score may be used in the immediately succeeding examination only. An applicant may transfer from another jurisdiction a Multistate Bar Examination scale score of 135 or more for use in the immediately succeeding examination only.

The Board shall destroy all examination papers, including questions and answers, at the time of the next succeeding bar examination. However, the original copy of each question shall be maintained in accordance with Rule III.

B. MULTISTATE PROFESSIONAL RESPONSIBILITY EXAMINATION

The provisions of Section A of this rule, titled GENERAL EXAMINATION, and the provisions of Rules II and IV of the Rules Governing Admission to the Bar shall govern the semiannual general examinations conducted by the Arkansas State Board of Law Examiners.

As a prerequisite for admission to the Bar of Arkansas by examination each applicant shall be required to attain a scaled score of 85 or more on the Multistate Professional Responsibility Examination (MPRE). This score shall be considered independent of the total score as set out in Section A of this rule. Any applicant may take the MPRE prior to a general examination, or within one (1) year from conduct of a general examination at which the applicant receives a passing score. Individuals who successfully complete the MPRE are allowed to retain, or transfer from another jurisdiction, their passing score for a period not exceeding three years from the date upon which the individual took the MPRE. There is no limit on the number of times that an applicant may take the MPRE without passing. (Per Curiam November 1, 1971; amended June 18, 1984; amended April 4, 1988; adopted and amended May 18, 1992; amended June 7, 1993; amended January 18, 1994; amended May 15, 1995; amended June 2, 1997; amended May 27, 1999; amended November 30, 2000; amended February 1, 2001; amended May 10, 2001; amended April 25, 2002; amended June 17, 2004; amended May 24, 2007; amended February 18, 2010; amended March 4, 2010.)

Publisher's Notes. This Rule was amended May 10, 2001, to add language concerning the MPT and to set an effective date for the new minimum scaled score on the

MPRE. This Rule was further amended April 25, 2002, to determine the weight of the MBE and the value of the two MPT questions.

CASE NOTES

Retaking Exam.

Under the pre-1997 version of part B. of this rule, an attorney desiring to take the

Arkansas Bar Exam in 1997 is ineligible to take the February exam, since the Ethics Exam is not given until March; the attorney

cannot qualify to take the Arkansas Bar Exam until July 1997. In re McIntyre, 327 Ark. 129, 936 S.W.2d 553 (1997).

Rule X. Applications to take examination.

All applications for leave to take the examination shall be filed with the Executive Secretary on or before November 15 of the year which precedes the February examination and April 1 which precedes the July examination. Applicants who fail the February Arkansas examination shall have until the following May 15 to file an application for the immediately subsequent July examination. If such date falls on a Saturday, Sunday, or legal holiday, the application deadline shall be on the next day which is not a Saturday, Sunday¹ or legal holiday. (Per Curiam January 18, 1965; amended January 15, 1979; adopted and amended May 18, 1992; amended June 2, 1997, effective 1999; amended November 11, 1999.)

Publisher's Notes. By Per Curiam dated June 2, 1997, the Supreme Court provided: "The Arkansas State Board of Law Examiners has recommended a change in the application filing date for initial admission to the Bar. The purpose of such change is to provide the Board with additional time in which to conduct character and fitness investigations pursuant to Rule XIII of the Rules Governing Admission to the Bar. We conclude that moving the application deadline forward will en-

hance the ability of the Board to conduct such investigations. Accordingly, we adopt and republish Rule X and Regulation V as they appear on the attachment to this per curiam.

"Recognizing that this modification of the Rules is a significant change, we find that deferral of its implementation for a substantial period of time is advised. Hence, the revised Rule X and Regulation V will not take effect until the filing period established for the July 1999 general bar examination."

Rule XI. Expense fee.

A fee, as established from time to time by the Court must accompany initial and subsequent applications to take the bar examination as well as applications for admission on motion as set forth in Rule XVI of these rules. Remittances for such fees shall be made by Post-Office Money Order or Cashier's Check payable to the Clerk of the Supreme Court. Fees thus provided shall be used by the Board to defray the expenses of examination, and necessary expenses of the Board Members while attending meetings. The members of the Board shall be entitled to receive per diem, and reasonable reimbursement for expenses of meals, lodging, and transportation as may be set from time to time by the Court. Fees shall also be used to assist the Board and the Executive Secretary in carrying out their duties under these rules. (Per Curiam April 21, 1969; amended October 25, 1976; amended April 23, 1979, effective July 1, 1979; amended June 30, 1980, effective September 1, 1980; adopted and amended May 18, 1992; amended June 17, 2004.)

Publisher's Notes. By Per Curiam dated June 6, 2002, the Supreme Court of Arkansas provided: "In July 2002, the Arkansas Bar Examination will be expanded to include an additional day. Such an increase will incur significant additional expenses for proctors, meeting rooms, and other expenses. In addition, the expanded time frame includes the addition of a separate test segment, the Multistate Performance Test (MPT). There will be additional costs attendant to purchasing that

examination from the National Conference of Bar Examiners.

"For these reasons, the Arkansas State Board of Law Examiners has unanimously recommended to this Court that the Arkansas Bar Examination fee be increased to \$325.00, effective with the February 2003 examination. We agree.

"Therefore, as set forth in Rule XI of the Rules Governing Admission to the Bar the examination expense fee for the general Ar-

kansas Bar Examination is set at \$325.00, effective with the February 2003 examination.”

Rule XII. Requirements for taking examination.

1. Graduation from a law school shall not confer the right of admission to the bar.

2. Candidates may be a United States citizen, an alien lawfully admitted for permanent residence, or an alien otherwise authorized to work or study lawfully in the United States.

3. No candidate shall be allowed to take the bar examination unless the applicant has graduated, or completed the requisites for graduation, from a Law School approved by the American Bar Association.

4. An applicant shall not be limited to the number of times he or she may take the Arkansas Bar Examination.

5. The requirements set forth in this rule, as well as the other Rules Governing Admission to the Bar, are exclusive and may not be contravened or supplemented except by further order of the Arkansas Supreme Court. (Per Curiam February 10, 1969 as amended September 22, 1969; amended September 11, 1972; amended December 10, 1979; amended March 23, 1983; adopted and amended May 18, 1992; amended January 18, 1994; amended September 16, 1996; amended June 17, 2004; amended September 22, 2005.)

Court's Comment to March, 1983 Amendment. The amended rules no longer exclude aliens lawfully residing in the United States from taking the bar examination or being admitted to the Arkansas Bar under the

reciprocity rule. *See In Re Griffiths*, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed.2d 910 (1973).

The purpose of this amendment is to rescind the immunity from criminal liability that was incorporated in the Rules in 1976.

RESEARCH REFERENCES

ALR. Sexual conduct or orientation as ground for denial of admission to bar. 105 ALR 5th 217.

Falsehoods, misrepresentations, impersonations, and other irresponsible conduct as bearing on requisite good moral character for admission to bar — Conduct related to admission to bar. 107 ALR 5th 167.

Failure to pay creditors as affecting applicant's moral character for purposes of admission to the bar. 108 ALR 5th 289.

U. Ark. Little Rock L.J. Sallings, Survey of Arkansas Law, 3 U. Ark. Little Rock L.J. 277.

CASE NOTES

Validity of Rule.

Authority of court in regulating the practice of law includes the preparation of rules determining and setting out the qualifications of

one who desires to take the bar examination. *In re Pitchford*, 265 Ark. 752, 581 S.W.2d 321 (1979), cert. denied 444 U.S. 863, 100 S. Ct. 131, 62 L. Ed. 2d 85 (1979).

Rule XIII. Standards and procedures for admission; readmission; and reinstatement.

The practice of law is a privilege. Admission to practice is based upon the grade made on the examination if one is taken, moral qualifications, and mental and emotional stability.

Generally

Every applicant for admission, readmission, or reinstatement, shall complete and file with the Executive Secretary (Secretary) of the Board of Law Examiners (Board) an application, verified under oath, on a form approved by the Board. The Board may conduct whatever investigation it deems appropriate as to any applicant.

Upon receipt of a petition seeking readmission to the bar after disbarment or surrender of license, the Board shall cause a public notice of pendency of the petition to be placed in a newspaper of general circulation in the State and one newspaper of local circulation. The site for publication of the local notice shall be left within the discretion of the Secretary based upon the circumstances surrounding the applicant's surrender or disbarment. These notices shall be published at least 30 days prior to the hearing or decision by the Chair of the Board (Chair) pursuant to this rule. The notice shall be in such form as designated by the Board.

Further, where an application is for readmission subsequent to disbarment or surrender of license, such application shall be subject to the limitations set forth in Section 24 — Readmission to the Bar — of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law, or its successor rule.

The determination of eligibility of every applicant shall be made in accordance with this rule and the burden of establishing eligibility shall be on the applicant. The standard of proof is preponderance of the evidence.

Any proceedings at which the testimony of witnesses is being taken under oath shall be open to the public.

A. Initial Review

Applications for admission, readmission after disbarment or surrender, or reinstatement after suspension pursuant to Rule VII(D) of these rules, shall be reviewed by the Secretary of the Board. Any application which raises questions of eligibility based upon the standards set out in this rule shall be referred to the Chair. The Chair, applying the standards set out in this rule, shall determine whether: the applicant is eligible for admission, readmission, or reinstatement; to recommend the deferral of the admission decision; or, the Chair is unable to determine eligibility for admission, readmission, or reinstatement.

B. Standards

In addition to meeting all other requirements of the Rules Governing Admission to the Bar, every applicant for admission and every applicant for readmission or reinstatement of license to practice must be of good moral character and mentally and emotionally stable.

C. Decision of Chair — Admission, Readmission, or Reinstatement Granted

In the event the Chair determines that an applicant for admission is eligible, the Chair shall notify the Secretary, who shall certify to the Clerk of the Supreme Court (Clerk) that the applicant is eligible for admission.

In the event the Chair determines that an applicant for reinstatement is eligible, the Chair shall certify to the Clerk that the applicant is eligible for

reinstatement. The Chair may condition such reinstatement upon the applicant taking the examinations as set forth in Rule IX of these rules or its successor rule.

In the event the Chair determines that an applicant for readmission after disbarment or surrender of license is eligible, the Chair shall so notify the applicant. The applicant will then be required to file a motion with the Arkansas Supreme Court as set forth in paragraph 2 of Section G of this rule. The Chair may condition such readmission upon the applicant taking the examinations as set forth in Rule IX of these rules or its successor rule.

D. Deferral of Admission Decision

The Chair shall annually appoint a Deferral of Admission Committee (Committee) composed of three (3) members. The committee members shall serve terms of one year subject to reappointment by the Chair. The Chair shall not be eligible to serve on the committee. The Chair shall designate the Chair of the committee.

In the event the Chair concludes that an applicant by examination might be eligible for admission absent circumstances set out hereafter, then the Chair may defer the eligibility decision and provide the applicant with the alternative of participation in a deferral of admission program (program). The circumstances which might warrant such a deferral are: an applicant currently has a condition or impairment resulting from alcohol or other chemical or substance abuse which currently adversely affects the applicant's ability to practice law in a competent and professional manner.

In such cases, the applicant shall be notified of the Chair's determination by certified, return receipt, restricted delivery mail. The applicant shall have thirty (30) days from receipt of notice in which to advise the Secretary that he or she is agreeable to participating in the program on such terms, and for such period of time, as may be set by the Committee. Failure of the applicant to timely agree to the program shall cause the application to be referred to the Board and processed as set forth in section E of this rule.

In the event an applicant elects the deferral of admission program, the committee shall secure such evidence as may be necessary to establish the terms and duration of the program. Such materials may include: documentary evidence supplied by the applicant; evidence secured by the Secretary; evidence acquired by an informal conference with members of the committee; or such other evidence as the committee may consider necessary to their decision. Prior to establishing the terms and duration of any deferral of admission program, the committee may reject the applicant as a candidate for the program. In such case, the applicant shall then be referred to the Board and processed as set forth in section E of this rule.

In the event the committee accepts the applicant as a participant in the program, then the applicant will sign an agreement with the committee which sets forth the terms and duration of the program. All expenses relating to the program shall be borne by the applicant, and this shall be part of the agreement. In the event the applicant does not sign the agreement within thirty (30) days of notification thereof, the deferral of admission for that applicant shall deem to have been waived. The applicant shall then be referred to the Board for disposition in accord with section E of this rule.

The deferral agreement may continue for a period not to exceed two (2) years.

At the conclusion of the deferral period, or anytime prior thereto, the committee shall determine whether the applicant has complied with all terms and conditions of the deferral agreement, and the committee shall so notify the Board. The Board shall then, by majority vote, make a determination as to whether the applicant is eligible for admission. In the event of a favorable Board vote, The Secretary shall then certify to the Clerk that the applicant is eligible for admission.

In the event the Committee determines that the applicant has failed to comply with the terms and requirements of the deferral agreement he or she shall be referred to the full Board for disposition in accord with the provisions of section E of this rule.

E. Referral to Board — Hearing — Procedures

In the event the Chair is unable to determine eligibility of the referred applicant, or in instances where other provisions of this rule mandate referral of the applicant to the Board for determination of eligibility, then the applicant shall be notified of such determination. The applicant shall be advised that he or she has a right to a hearing on the question and the right to be represented by counsel at the expense of the applicant. Such notice shall be sent by certified, return receipt, restricted delivery mail. The applicant shall have thirty (30) days from receipt of the notice to request a hearing. Such request shall be in writing and addressed to the Secretary.

Upon request of the applicant, the Chair shall appoint a hearing panel (panel) from the Board comprised of not less than three members who shall proceed to a hearing as hereafter provided. The Chair shall not be eligible to serve thereon. Absent exigent circumstances, the hearing shall be conducted within 60 days after the Secretary is notified that the applicant requests a hearing. The Chair shall designate a member to serve as Chair of the panel. For good cause shown, the Chair of the panel may grant extensions of time.

This panel shall be appointed for the sole purpose of making a full and accurate record of all facts and circumstances affecting the application.

The Secretary shall act as evidence officer for the hearing with the responsibility of procuring and presenting evidence that may be pertinent, either for or against the applicant. However, for good cause shown, the Chair of the Board is authorized to appoint a substitute evidence officer.

At the start of the hearing, the evidence officer shall establish that all procedural requirements have been met as required by this rule and introduce documentary evidence. The applicant shall then present evidence in support of the application without regard to rules of evidence but subject to cross-examination. At the close of the applicant's presentation, the evidence officer shall then present any additional evidence which is pertinent, subject to cross-examination, and the applicant shall then be permitted to introduce any additional evidence which may be pertinent in rebuttal, subject to cross-examination. The record may be held open for a set period to acquire additional evidence.

All costs and expenses attributable to the preparation and distribution of the transcript shall be borne by the applicant. The applicant shall be required to post a bond as set by the Secretary to insure payment of such costs and expenses. The panel shall have authority to issue summons for any person or subpoenas for any witness, directed to any Sheriff or State Police Officer within the State, requiring the presence of any party or the attendance of any witness before it, to include production of pertinent

documents or records. Such process shall be issued under the seal of the Supreme Court of the State of Arkansas and be signed by the Chair of the panel, or the Secretary. Summonses or subpoenas shall be served in any manner provided by the Arkansas Rules of Civil Procedure for service of process. Likewise, the affected applicant shall be entitled to compel, by summons or subpoena issued in the same manner, the attendance and testimony of witnesses, and the production of pertinent documents or records. The Circuit Court of Pulaski County shall have the power to enforce process. Disobedience of any summons or subpoena or refusal to testify shall be regarded as constructive contempt of the Arkansas Supreme Court.

Failure of the applicant to timely request a hearing or tender the bond required by the Secretary shall cause the application to be administratively terminated. After such termination, the applicant must file a new application for admission, readmission, or reinstatement, accompanied by the appropriate fees.

At the conclusion of the hearing, a copy of the transcript of the proceedings shall be submitted without comment to each member of the Board and the applicant. The Board, within thirty (30) days of receipt of the transcript, after considering the entire record de novo, shall by majority vote, determine the eligibility of the applicant. Thereafter, within sixty (60) days of said vote, the Board shall cause to be filed with the Secretary the findings of fact and conclusions of the Board, a copy of which shall be delivered to the applicant. Any concurrence or dissent in writing shall be made a part of the record and a copy furnished to the applicant. In instances where the Board votes to grant admission of a new applicant, no findings of fact and conclusions are required.

F. Board Decision — Evidentiary Hearing — Admission, Readmission or Reinstatement Denied — Appeal

Within thirty (30) days of receipt of written findings of the Board denying eligibility, the applicant may appeal said findings to the Supreme Court of Arkansas for review de novo upon the record. Such appeal shall be prosecuted by filing a written notice of appeal with the Clerk with a copy to the Secretary. The notice of appeal shall specify the party taking the appeal; shall designate the order of the Board from which appeal is sought; and, shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been requested from the Secretary. The Secretary shall certify the record as being a true and correct copy of the record as designated by the parties and it shall be the responsibility of the appellant to transmit such record to the Clerk. The record on appeal shall be filed with the Clerk within ninety (90) days from filing of the notice of appeal, unless the time is extended by order of the Board. In no event shall the time be extended more than seven (7) months from the date of entry of the order of the Board. Such appeals shall be processed in accord with pertinent portions of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas.

G. Board Decision — Evidentiary Hearing — Admission, Readmission or Reinstatement Recommended

The Board may recommend that an applicant be certified for admission. In such cases, the Secretary shall certify to the Clerk that the applicant is eligible for admission.

The Board may recommend readmission of an applicant subsequent to disbarment or surrender of license, or reinstatement after suspension of license pursuant to Rule VII (D) where a hearing panel has been appointed. In the Board's discretion, the applicant may be required to take the examinations set forth in Rule IX of these rules, or its successor rule. Subsequent to such recommendation the applicant shall file with the Court a motion pursuant to Rule 2-1 of the Rules of the Supreme Court and Court of Appeals, or its successor rule. Such a motion must be filed within thirty (30) days of receipt of notice that the Board has recommended readmission or reinstatement. The applicant shall file a single copy of the original transcript of the hearing, if one has been conducted, to include the findings of fact and conclusions, or, the original copy of the authorization for readmission which has been issued by the Chair of the Board. The motion filed in conjunction with the transcript or recommendation from the Chair shall briefly summarize the circumstances leading to the disbarment, surrender, or suspension. The matter shall then be referred to the Arkansas Supreme Court for disposition, at its discretion, in accordance with regular motion practice pursuant to Rule 2-1 or its successor rule.

H. General

All other Rules Governing Admission to the Bar are hereby amended to conform with the provisions of this rule. (Per Curiam May 18, 1992; amended January 18, 1994; amended May 13, 1996; amended March 26, 1998; amended November 20, 2003; amended June 17, 2004.)

RESEARCH REFERENCES

ALR. Criminal record as affecting applicant's moral character for purposes of admission to the bar. 3 ALR 6th 49.

Ark. L. Rev. Partin v. Bar of Arkansas: The Good Moral Character Requirement for Arkansas Bar Applicants, 49 Ark. L. Rev. 829.

CASE NOTES

ANALYSIS

Appellate review.

Burden of proof.

Fitness to practice law.

Initial applicants.

Jurisdiction.

Petition for reinstatement.

Reinstatement denied.

Appellate Review.

A petition for reinstatement to the bar pursuant to this rule results in proceedings which are civil in nature, and thus the "clearly erroneous" standard for review, as provided in ARCP 52, applies to the reinstatement proceedings. In re Shannon, 274 Ark. 106, 621 S.W.2d 853 (1981).

A federal district court lacks subject matter jurisdiction to review a state court's allegedly unconstitutional denial of an attorney's admission to the bar; the state court action is judicial in nature, and final state court judgments may be reviewed only by the U.S. Supreme Court. Partin v. Arkansas State Bd.

of Law Exmrs., 863 F. Supp. 924 (E.D. Ark. 1994), aff'd without opinion 56 F.3d 69 (8th Cir. 1995).

Burden of Proof.

The applicant has the burden of proving eligibility and must do so by a preponderance of the evidence. Partin v. Bar of Ark., 320 Ark. 37, 894 S.W.2d 906 (1995).

In cases in which the Supreme Court is asked to review a moral character decision of the Board, the court is concerned with whether the applicant proved that he or she had sufficient moral character by a preponderance of the evidence. Partin v. Bar of Ark., 320 Ark. 37, 894 S.W.2d 906 (1995).

Fitness to Practice Law.

The issue of whether chemical dependency involving the use of illegal drugs disqualifies one from practicing law rather than moral turpitude, is one of fitness to practice law; therefore, where applicant had two episodes of relapse and had been free of drug usage for two years, it was not unreasonable to require

two more years of sobriety. In *re* Crossley, 310 Ark. 435, 839 S.W.2d 1 (1992).

The Board of Law Examiners properly found that an applicant failed to establish good moral character where (1) he was suspended from the practice of dentistry and surrendered his license after he admitted that he billed an insurance company for services not rendered and later practiced dentistry while his license was suspended, (2) he failed to accept responsibility for certain aspects of his misconduct and failed to show that he rehabilitated himself, and (3) he gave false, misleading, or incomplete answers on his bar application character questionnaire. *Shochet v. Arkansas Bd. of Law Exam'rs*, 335 Ark. 176, 979 S.W.2d 888 (1998).

Initial Applicants.

The procedural provisions in this rule for cases in which there were character and fitness issues applied to an initial applicant prior to the 1994 Amendment, the Amendment which made this rule's applicability to initial applicants clear. *Partin v. Bar of Ark.*, 320 Ark. 37, 894 S.W.2d 906 (1995).

When a former attorney has been out of the law practice for a considerable amount of time, it is not likely that the Supreme Court would order immediate reinstatement to the bar. Rather, it is more likely that he or she would only be deemed morally fit to take the bar examination once again and, if he or she passed the exam, then the license could be reinstated. In *re* Butcher, 322 Ark. 24, 907 S.W.2d 715 (1995).

Jurisdiction.

Petition for admission to the Bar of Arkansas was dismissed for lack of original jurisdic-

tion; the court's jurisdiction in connection with applications for admission to the bar is solely for appellate review of the decisions of the Board of Law Examiners. *Partin v. State Bd. of Law Exmrs.*, 329 Ark. 496, 950 S.W.2d 460 (1997).

Petition for Reinstatement.

On appeal from a denial of a petition for reinstatement to practice law, the findings of the State Board of Law Examiners are reviewed de novo, and unless clearly erroneous, they will not be set aside. *Scales v. State Bd. of Law Exmrs.*, 282 Ark. 578, 669 S.W.2d 895 (1984).

It was premature for the Supreme Court to take any action concerning petitioner's application for reinstatement of her law license where she had not yet taken the bar examinations and thus all of the conditions for reinstatement had not been satisfied. In *re* Baxter, 323 Ark. 232, 913 S.W.2d 791 (1996).

Reinstatement Denied.

Former attorney failed to meet his burden of establishing eligibility for reinstatement under this rule where the conduct for which he was convicted involved dishonesty, breach of trust, serious interference with the administration of justice and undermined the confidence of the public in the system of justice and the legal profession. In *re* Lee, 305 Ark. 196, 806 S.W.2d 382 (1991).

Petition for reinstatement was denied where applicant was suspended from the bar but continued to practice law, then in seeking reinstatement he falsely stated under oath that he had terminated practice. In *re* Lewis, 308 Ark. 610, 826 S.W.2d 264 (1992).

Rule XIV. Practice by comity.

A lawyer residing outside the State of Arkansas who has been admitted to practice law in the Supreme Court of the United States or in the United States Court of Appeals for the circuit in which the attorney resides or in the Supreme Court or the highest appellate court of the state of the attorney's residence, and who is in good standing in the court of the attorney's admission, will be permitted by comity and by courtesy to appear, file pleadings and conduct the trial of cases in all courts of the State of Arkansas. However, any trial court may require such nonresident attorney to associate a lawyer residing and admitted to practice in the State of Arkansas upon whom notices may be served and may also require that the Arkansas lawyer associated be responsible to the court in which the case is pending for the progress of the case, insofar as the interest represented by the Arkansas lawyer and the nonresident lawyer is concerned.

Unless the State in which the said nonresident lawyer resides likewise accords similar comity and courtesy to Arkansas lawyers who may desire to appear and conduct cases in the courts of that State, this privilege will not be extended to such nonresident lawyer.

A nonresident lawyer will not be permitted to engage in any case in an Arkansas court unless a written statement is filed with the court in which the nonresident lawyer submits to all disciplinary procedures applicable to Arkansas lawyers.

This rule shall supersede Act 222 of the General Assembly of 1911, as amended. Ark. Stat. Ann. [Section 25-108 through Ark. Stat. Ann. Section 25-111 (Repl. 1962)]. (Per Curiam October 6, 1975; adopted and amended May 18, 1992.)

CASE NOTES

ANALYSIS

Compliance with rule.
Corporation counsel.
Practice of law.
Sufficiency of motion.

Compliance with Rule.

A motion for an extension of time for the filing of a brief by a nonresident attorney is subject to dismissal for noncompliance with this rule, and if he failed to sign a written statement submitting himself to all disciplinary procedures applicable to Arkansas lawyers within 20 days, the motion would be dismissed. *Walker v. State*, 274 Ark. 124, 622 S.W.2d 193 (1981); *Walker v. State*, 274 Ark. 325, 624 S.W.2d 439 (1981).

Where appellants' attorneys, who were licensed in Oklahoma but not in Arkansas, filed appellants' medical malpractice complaint on the last day of the limitations period, but did not file motions for admission pro hac vice until eight months later, the trial court properly dismissed the complaint; since this rule required that the pro hac vice motions be filed before the attorneys practiced law in Arkansas, the complaint was a nullity and, thus, no valid complaint was filed within the limitations period. *Preston v. Univ. of Ark. for Med. Scis.*, 354 Ark. 666, 128 S.W.3d 430 (2003).

Corporation Counsel.

To permit one to qualify under the requirement that he be engaged in the actual prac-

tice of law upon the basis of legal activity principally performed in this state for a single corporate client-employer would be tantamount to affixing an ex post facto imprimatur of approval on what might be construed as the unauthorized practice of law, and is contrary to the policy expressed by this rule. *Undem v. State Bd. of Law Exmrs.*, 266 Ark. 683, 587 S.W.2d 563 (1979).

Practice of Law.

It is quite true that the practice of law is not confined to services by an attorney in a court of justice; it also includes any service of a legal nature rendered outside of courts and unrelated to matters pending in the courts. *Undem v. State Bd. of Law Exmrs.*, 266 Ark. 683, 587 S.W.2d 563 (1979).

Service as president and chief executive officer of a bank and trust did not constitute "active practice of the law." *Undem v. State Bd. of Law Exmrs.*, 266 Ark. 683, 587 S.W.2d 563 (1979).

Sufficiency of Motion.

The court would not admit, pro hac vice, an attorney licensed in Texas since neither the motion nor affidavit mentioned (1) whether Texas courts would allow Arkansas attorneys to appear by comity in a similar situation or (2) that the attorney resided outside Arkansas. *Willett v. State*, 334 Ark. 40, 970 S.W.2d 804 (1998).

Cited: *Hicks v. State*, 324 Ark. 450, 921 S.W.2d 604 (1996).

Rule XV. Student practice.

A. *Purpose.* The bench and the bar are primarily responsible for providing competent legal services for all persons, including those unable to pay for these services. As one means of providing assistance to lawyers who represent clients unable to pay for such services and to encourage law schools to provide clinical instruction of varying kinds, this rule is adopted by the Arkansas Supreme Court (Court).

B. Activities.

(1) An eligible law student (student) may appear in any court or before any administrative tribunal in this State on behalf of any person if the person on whose behalf the student is appearing has indicated in writing consent to that appearance and the supervising lawyer (lawyer) has also indicated in writing approval of that appearance.

(2) A student may also appear in any criminal matter on behalf of the State or prosecuting authority with the written approval of the prosecuting attorney (lawyer) or his or her authorized representative.

(3) When a student appears pursuant to paragraphs B(1) or (2) above the lawyer must be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted.

(4) In civil cases and cases in which the student represents a defendant in a criminal case, the written consent of the person on whose behalf an appearance is being made and the approval of the lawyer shall be filed in the record of the case. In courts or administrative tribunals in which the student represents the State or prosecuting authority, the approval of the lawyer shall be filed of record with the clerk of the court or administrative tribunal.

(5) An eligible law student may also participate in a law school clinical program emphasizing transactional and drafting skills including client counseling.

C. Requirements of Eligibility. In order to make an appearance or provide counsel pursuant to this rule, the law student shall:

(1) Be duly enrolled in a law school approved by the American Bar Association;

(2) Have completed professional responsibility, or the equivalent of such a courses [sic];

(3) File with the Clerk of this Court the law school dean certification described in paragraph E of this rule;

(4) File with the Clerk of this Court the supervising lawyer certification described in paragraph F of this rule;

(5) Neither ask for nor receive any compensation or remuneration of any kind directly from the person on whose behalf services are rendered, but this shall not prevent an attorney, law firm, legal aid bureau, public defender agency, or the state, county, or municipality from paying compensation not otherwise prohibited by these rules to the student.

(6) Certify in writing that he or she has read and will comply with this rule and with the Model Rules of Professional Conduct adopted by this Court. This certification shall be incorporated in the law school dean certification described in paragraph E of this rule.

(7) If appearing under paragraphs B(1), (2) or (3), have completed legal studies amounting to at least forty-eight (48) credit hours, or the equivalent if the school is on some basis other than a semester basis, including courses in civil procedure, evidence, criminal procedure, and professional responsibility or the equivalent of such courses.

D. Limitations.

(1) A student is authorized to practice under this rule only under the supervision of:

(a) The lawyer who signs the supervising lawyer certification described in paragraph F of this rule; or,

(b) A lawyer who is admitted to practice in this State and who otherwise meets the requirements of Section H of this rule and is a member of the same law firm as the supervising lawyer; or, a lawyer who is admitted to practice in this State and is employed by the same law school or public office as the supervising lawyer; or,

(c) A lawyer employed full time by an Arkansas Law School accredited by the American Bar Association, may engage in supervision under this section for no more than one year without being admitted to practice in this State, providing the lawyer:

1. is admitted to practice and is in good standing in another state; and;
2. has had at least five years of practice or law teaching in another state or states; and,
3. it shall be the responsibility of the Arkansas law school which employs a full time lawyer pursuant to this section to secure and maintain documentation confirming that the lawyer meets the requirements of this section, and, the law school dean certification shall contain an affirmation by the dean to that effect.

(2) The authority of a law student to practice under this rule may be terminated by this Court at any time without notice or hearing and without any showing of cause. Notice of the termination shall be filed with the Clerk of this Court.

(3) After a law student has appeared in a court or administrative tribunal on one or more occasions, a judge of the trial court or tribunal may terminate, for good cause, the authority of any such student to appear subsequently in the court or division thereof, or the administrative tribunal, over which the Judge presides.

E. Law School Dean Certification. The certification of a law student by the law school dean shall:

(1) Unless sooner withdrawn, remain in effect until: the expiration of eighteen (18) months after it is filed; or, the student graduates; or, the student officially withdraws from law school;

(2) Certify that the law student is of good moral character and competent legal ability and is adequately trained to perform as an eligible law student under this rule;

(3) Be subject to withdrawal by the dean at any time by mailing a notice to that effect to the Clerk of this Court and it is not necessary that the notice state the cause for withdrawal; and,

(4) The law school dean certification required by this section shall contain an affirmation that the dean of the certifying institution will promptly notify the Clerk of this Court in the event the student's eligibility ceases pursuant to this section.

F. Supervising Lawyer Certification. The certification of a law student by a lawyer shall:

(1) Be signed by a lawyer admitted to practice in this State who agrees to act as a supervising lawyer with respect to practice by a law student under this rule;

(2) Unless sooner withdrawn, remain in effect until: the expiration of six (6) months after it is filed; or, the student graduates; or, the student officially withdraws from law school;

(3) Be subject to renewal by filing a new certification;

(4) Certify that the lawyer has read and will comply with this rule and with the Model Rules of Professional Conduct adopted by this Court; and,

(5) Be subject to withdrawal by the lawyer at any time by mailing a notice to that effect to the Clerk of this Court and it is not necessary that the notice state the cause for withdrawal.

G. Other Activities.

(1) In addition, a student may engage in other activities, but outside the personal presence of the lawyer, including:

(a) Preparation of pleadings and other documents to be filed in any matter in which the student is eligible to appear under paragraphs B(1), (2) or (3), but such pleadings or documents must be signed by the lawyer;

(b) Preparation of briefs, abstracts, and other documents to be filed in appellate courts of this State by a student eligible under paragraphs B(1), (2) or (3), but such documents must be signed by the lawyer; and,

(c) Preparation of contracts, incorporation papers and by-laws, agreements, filings required by a state, federal or other governmental agency or body, proposed legislation and other documents for a client's consideration by a student certified under paragraph B(5). Such documents must be reviewed by the lawyer prior to presentation to the client and signed by the lawyer if a lawyer's signature is necessary. In preparation of these documents, the student may give legal advice if such advice has been approved or is supervised by the lawyer. Approval or supervision by the lawyer shall be accomplished through preparation of the student and videotaping of client contacts or the lawyer's presence during client contacts. The other activities set forth in this paragraph (c) are authorized exclusively for students representing persons receiving assistance from a law school clinical program which emphasizes transactional and drafting skills including client counseling.

(2) The taking of a deposition shall be considered a court appearance subject to the provisions and requirements of section B of this rule.

H. *Supervision.* The lawyer under whose supervision a student does any of the things permitted by this rule shall:

(1) Be a lawyer who is licensed in this State (except as may be otherwise provided by this rule) and who has been actively engaged in the practice of law in this State or any other jurisdiction for a period of at least two years and is in good standing with the Supreme Court of Arkansas;

(2) Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work;

(3) Assist the student in preparation to the extent the lawyer considers it necessary; and,

(4) The lawyer may not charge the client for services of a student practitioner pursuant to activities under section B of this rule.

I. *Duties of the Clerk of this Court.* The Clerk shall establish such records as are appropriate to administer and enforce the provisions of this rule.

J. *Miscellaneous.* Nothing contained in this rule shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of this rule." (Adopted April 27, 1987; republished December 20, 1993; amended July 17, 1995; amended May 7, 1998.)

RESEARCH REFERENCES

ALR. Propriety and Effect of Law Students Acting as Counsel in Court Suit. 62 ALR 6th 259.

CASE NOTES

Cited: B.A.R. Enters., Inc. v. Palin Mfg. Co., 312 Ark. 500, 850 S.W.2d 322 (1993); Dougan v. State, 322 Ark. 384, 912 S.W.2d 400 (1995); Galvin v. State, 323 Ark. 125, 912 S.W.2d 932 (1996); Lee v. State, 326 Ark. 229, 931 S.W.2d 433 (1996); Kersh v. State, 56 Ark. App. 39, 938 S.W.2d 569 (1997); Vega v. State, 56 Ark. App. 145, 939 S.W.2d 322 (1997).

Rule XVI. Admission on motion.

1. An applicant who meets the requirements of (a) through (i) of this rule may, upon motion, be admitted to the practice of law in this jurisdiction.

The applicant shall:

(a) have been admitted to practice law in another state, territory, or the District of Columbia;

(b) hold a first professional degree in law (J.D. or LL.B.) from a law school approved by the American Bar Association at the time the degree was conferred;

(c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;

(d) establish that the state, territory, or the District of Columbia in which the applicant has or had his or her principal place of business for the practice of law, for the two year period immediately preceding establishment of permanent residence in this State or filing application under this rule, would allow attorneys from this State a similar accommodation as set forth in this rule; however, applicants who have been on continuous active military duty for five of the seven years mentioned in (c) above may, in the discretion of the Board, be excused from the two year requirement of this rule;

(e) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;

(f) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdiction;

(g) establish that the applicant possesses the character and fitness to practice law as set out in Rule XIII of these rules;

(h) designate the Clerk of this Court for service of process; and,

(i) pay a fee as may be set by this Court.

2. For the purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted to practice; however, in no event shall activities listed under (2)(e) and (f) that were performed within Arkansas in advance of bar admission here, be accepted toward the durational requirement:

(a) representation of one or more clients in the practice of law;

(b) service as a lawyer with a local, state, territorial or federal agency, including military service;

(c) teaching law at a law school approved by the American Bar Association;

(d) service as a judge in a federal, state, territorial or local court of record;

(e) service as a judicial law clerk; or,

(f) service as corporate counsel.

3. For the purposes of this rule, the active practice of law shall not include work that, as undertaken constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.

4. An applicant who has failed a bar examination administered in Arkansas within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

5. Proceedings under this rule shall be governed by the relevant provisions of Rule XIII of these rules. Further, the applicant must complete the Petition and Oath and file same with the Clerk of the Supreme Court along with all required fees for licensure within one year of the date of certification of eligibility for admission. Failure to do so will extinguish the application and forfeit the fee and the applicant will be required to file a new application and pay another fee if the applicant wishes to proceed to secure admission.

6. Upon request of the Executive Secretary, where an application has been pending for more than one year, the Board may cancel the pending application, after appropriate notice to the applicant, and forfeit the fee and require the applicant to submit a new application and pay another fee in order to proceed. (Adopted February 26, 2004, effective October 1, 2004; amended November 15, 2007; May 29, 2008; amended October 9, 2008.)

Publisher's Notes. The Per Curiam of the Arkansas Supreme Court of February 26, 2004, provided in part: "We adopt the admission on motion rule as it appears on the attachment to this order. The rule shall be added to our existing *Rules Governing Admission to the Bar* as Rule XVI. The effective date of this rule will be October 1, 2004. Between now and then, the Board of Law Examiners is

directed to determine an appropriate fee for this new mode of admission to the Bar of Arkansas and report back to this Court. In addition, the Board of Law Examiners is directed to develop appropriate forms and procedures and determine whether other rules of our *Rules Governing Admission to the Bar* must be amended as a result of the adoption of this rule."

APPENDIX

APPLICATION REGULATIONS

Regulation 1.

Subsequent to an examination, an applicant may not have access to copies of his or her answers. (Adopted September 16, 1996.)

Regulation 2.

A passing score under this rule shall remain valid for a period of one (1) year after its determination, or a final vote of the Board on admissibility of the applicant, whichever is earlier, subject to the following exceptions:

(a) In the event of Board denial of initial admission, followed by an appeal to the Arkansas Supreme Court pursuant to Rule XIII of these rules, or other litigation challenging such denial, the examination score shall remain valid until the conclusion of the appeal or litigation; or,

(b) In the event the applicant opts to participate in the deferral of initial admission program as set forth in Rule XIII of these rules, then the examination score shall remain valid until final Board determination of admissibility, or administrative termination, whichever is earlier; and,

(c) Periods of delay attributable to actions of the Board or its Executive Secretary shall be excluded from the calculation of the aforementioned one year period. (Adopted September 16, 1996; amended April 25, 2002.)

Regulation 3.

The application required by this rule shall be in the office of the Secretary of the State Board of Law Examiners no later than 5:00 p.m. on the date that is determined by the provisions of Rule X. (Adopted September 16, 1996; amended April 25, 2002.)

Publisher's Notes. See Rule IX of the Rules Governing Admission to the Bar. The scoring methodology in that rule was changed

effective Feb. 1, 2001. A corresponding amendment to this regulation was not made in that per curiam order.

Regulation 4.

The character questionnaire required by this rule shall bear the original signature of the applicant. (Adopted September 16, 1996; amended April 25, 2002; amended May 25, 2006.)

Regulation 5.

In those instances where the Chair of the Board determines that an evidentiary hearing is required, and a bond is requested by the Executive Secretary, pauper status is not available to the applicant. (Adopted September 16, 1996; amended June 2, 1997; amended April 25, 2002.)

Regulation 6.

Pursuant to the section of this rule [RGAB XIII] titled "Board Decision — Evidentiary Hearing — Appeal After Denial" only those votes conveyed to the Executive Secretary within thirty (30) days after receipt of the transcript by the respective Board members shall be counted. In the event of abstention by a Board member prior to a vote on the transcript, the Court shall appoint a substitute examiner to review the record de novo. (Adopted September 16, 1996; amended April 25, 2002.)

Regulation 7.**Miscellaneous Fee Schedule**

Application mailing fee	\$ 5.00
MBE transfer fee	\$ 25.00
Copies — per page	\$.25

The miscellaneous fees set forth above are in addition to any other fees or expenses the applicant may be required to submit in connection with his or her application. (Adopted as former Regulation 7 November 5, 1998; amended April 25, 2002; amended May 15, 2003.)

Regulation 8. Standards for Admission.

(a) The revelation or discovery of any of the following may be treated as cause for further inquiry before the Board determines whether the applicant possesses good moral character and mental and emotional stability:

1. Unlawful conduct;
2. Academic misconduct;
3. Misconduct in employment;
4. Acts involving dishonesty, fraud, deceit or misrepresentation;
5. Acts which demonstrate disregard for the rights or welfare of others;
6. Abuse of legal process, including the filing of vexatious or frivolous lawsuits;
7. Neglect of financial responsibilities;
8. Neglect of professional obligations, including failure to comply with time constraints;
9. Violation of an order of a court;
10. Conduct that evidences current mental or emotional instability that may impair the ability to practice law;
11. Conduct that evidences current drug or alcohol dependence or abuse that may impair the ability to practice law;
12. Denial of admission to the Bar in another jurisdiction;
13. Disciplinary action by a lawyer disciplinary agency or other professional disciplinary agency of any jurisdiction;
14. Making of false statements, including omissions, on bar applications in this state or any other jurisdiction; and,
15. Any other conduct that reflects adversely on the good moral character and mental and emotional stability of the applicant.

(b) In making the determination of whether the applicant is of good moral character and mentally and emotionally stable, the following factors may be considered in assigning weight and significance to prior conduct:

1. Applicant's age at the time of the conduct;
2. Recency of the conduct;

3. Reliability of the information concerning the conduct;
4. Seriousness of the conduct;
5. Factors underlying the conduct;
6. Cumulative effect of the conduct;
7. Evidence of rehabilitation;
8. Applicant's positive social contributions since the conduct;
9. Applicant's candor in the admissions process;
10. Materiality of any omissions or misrepresentations; and,
11. Any other conduct that reflects adversely on the good moral character and mental and emotional stability of the applicant.

(c) The Applicant has a continuing obligation to update the application with respect to all matters raised in the application. This obligation continues during the pendency of the application, including the period when the matter is on appeal to the Board or the Court.

(d) Seeking counsel from the Judges and Lawyers Assistance Program (JLAP) for physical or mental disabilities that result from disease, substance abuse, disorder, trauma, or age that might impair the applicant's ability to practice (impairments) shall not be considered adversely by the Board in its evaluation. Further, should the applicant choose to participate in a program designed for him or her by JLAP, and successfully complete that program by the time of graduation, the evidence of such rehabilitation and recovery shall be considered favorably by the Board when evaluating the applicant's character and fitness. The applicant's failure to complete a treatment program may be considered adversely by the Board. (Adopted September 30, 2004; amended November 11, 2010.)

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ARKANSAS RULES FOR MINIMUM CONTINUING LEGAL EDUCATION

Rule

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3. Minimum educational requirements.
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5. Reporting.
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-

Publisher's Notes. The Per Curiam order of the Supreme Court delivered July 9, 1990, provided, in part:

"The Rules and Regulations shall become effective upon the date of this per curiam."

Rule 1. Continuing Legal Education Board.

(A) There is hereby established the Arkansas Continuing Legal Education Board (hereinafter referred to as the Board). The Board shall be composed of nine voting members, appointed by the Arkansas Supreme Court, all of whom are resident members of the Bar of Arkansas. In addition, the Dean of each Arkansas law school accredited by the American Bar Association shall be an ex-officio member, without vote.

(B) There shall be at least one Board member from each of the four congressional districts.

(C) All subsequent appointments shall be made by the Arkansas Supreme Court for terms of three years. Board members may be reappointed, but may serve no more than two terms of three years. The Arkansas Supreme Court shall fill all vacancies, with the appointee to serve the remaining term, for such position, subject to reappointment in accord with this paragraph. Any Board member whose term expires shall continue in office until his successor is appointed and qualified.

(D) The Board shall, annually, by majority vote, elect a Chairman from among its voting members. The Director of the Office of Professional Programs for the Arkansas Supreme Court shall serve as Secretary, without a vote. Board members shall be entitled to reasonable reimbursement for expenses and such per diem compensation as the Court may from time to time direct.

(E) The Board shall have the following duties and responsibilities:

(1) Exercise general supervisory authority over these rules, to include the imposition of sanctions for noncompliance with these rules, as well as the implementation and administration of these rules;

(2) Adopt regulations consistent with these rules, to be submitted to the Arkansas Supreme Court for approval prior to their implementation;

(3) The Board may appoint committees as may be necessary to efficiently administer these rules; however, all matters concerning sanctions for noncompliance with these rules shall be the duty and responsibility of the Board.

(4) In cases of extreme hardship due to mental or physical disability, the Board may approve a substitute plan by which individuals may meet the requirements of these rules; and

(5) Such other specific grants of authority as may be set out in these rules.

(F) A majority of all voting Board members shall constitute a quorum. (Amended and substituted July 9, 1990; amended June 27, 1994, effective July 1, 1994; amended November 18, 2004.)

Rule 2. Scope.

(A) Except as noted elsewhere in Rule 2, these rules shall apply to every member of the Bar of Arkansas, including all levels of the State and Federal Judiciary, and all attorneys who may be suspended during any reporting period due to nonpayment of license fee or action by the Supreme Court Committee on Professional Conduct. When used in the course of these rules, the word attorney shall include judges.

(B) Exemptions: Any attorney or Judge who attains age 70 or completes 40 years of licensure as an Arkansas lawyer, during any given reporting period, is exempt from all requirements of the Arkansas Rules for Minimum Continuing Legal Education (hereinafter referred to as CLE) for that reporting period as well as all subsequent reporting periods.

(C) Nonresident Attorneys:

(1) Attorneys who are members of the Bar of Arkansas, but reside outside this state, are required to meet the minimum continuing legal education requirements of their resident state. Such attorneys shall complete annual certification forms to that effect. These forms will be filed with the Arkansas Continuing Legal Education Board on or before the October 31 which succeeds the reporting period in question. Such certifications shall be subject to verification through the agency which administers the continuing legal education program for such resident state. In the event an attorney is a member of the Bar of Arkansas, yet resides in a state or foreign jurisdiction where there is no continuing legal education requirement, such attorneys shall be annually required to file with the Arkansas Continuing Legal Education Board a certification form confirming that fact. This form shall be filed on or before the October 31 which succeeds the reporting period in question. Further, in the event an attorney returns to the practice of law in the State of Arkansas from a state where there has been no continuing legal education requirement that attorney shall be required, by the end of the first reporting period after the attorney's return, to acquire thirty-six (36) hours of accredited continuing legal education. Twelve (12) of those hours shall be a basic skills course or bar examination review course as approved by the Board.

(2) Nonetheless, an Arkansas licensed attorney or judge who resides: in a state which does not require continuing legal education; in a foreign jurisdiction; or, in a state which requires continuing legal education but is not licensed in that state and is therefore prohibited from participating in the continuing legal education program of that state, may remain current as regards Arkansas CLE requirements. Such attorneys may do so by meeting

the twelve (12) hour requirement as set out in Rule 3(A). The Secretary shall obtain from such attorneys appropriate documentation to confirm compliance with the Arkansas CLE program. In the event attorneys are in compliance with Rule 3(A) during the reporting period preceding their return to the practice of law in Arkansas, they shall not be subject to the thirty-six (36) hour requirement mentioned in paragraph 2(C)(1) above. In the event an attorney has elected to remain current, yet fails to acquire 12 hours of approved CLE during any reporting period, that attorney shall be subject to the sanctions of Rule 6.

(D) Inactive Status:

(1) At anytime during a reporting period, an attorney on active status, with the exception of sitting judges, may take inactive status for the purpose of these rules. Such status may be secured by filing a petition in accord with Section 25 A.(7) of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law (Procedures) or its' successor provision. By taking inactive status, the attorney shall be exempt from the minimum educational requirements of rule 3 for that reporting period and subsequent reporting periods.

(2) An attorney may return to active practice by petition filed as set forth in Section 23 of the Procedures or its' successor provision.

(3) Such attorneys shall be required to obtain thirty-six (36) hours of qualified continuing legal education between the date of return to active status (which is the date the reinstatement fee is received by the Board) and the end of the next succeeding reporting period. (Amended and substituted July 9, 1990; amended January 13, 1992, effective March 1, 1992; amended June 27, 1994, effective July 1, 1994; amended June 27, 2002; amended January 1, 2007.)

Publisher's Notes. The word "status" in square brackets, in subsection (D)(2) of this rule, was inserted by the Publisher.

By per curiam order dated June 1, 2006, the Arkansas Supreme Court provided: "As set forth in the preceding section, election of inactive status for CLE purposes will now be

administered through the Procedures Regulating the Professional Conduct of Attorneys At Law. Thus, the current Regulation 2.02 (1), which governs the reinstatement fee, is no longer necessary. We delete Regulation 2.02 (1) from the Regulations of the Arkansas Continuing Legal Education Board."

Rule 3. Minimum educational requirements.

(A) Every member of the Bar of Arkansas, except as may be otherwise provided by these rules and, excepting those attorneys granted voluntary inactive status by the Arkansas Supreme Court Committee on Professional Conduct, shall complete 12 hours of approved continuing legal education during each reporting period as defined by Rule 5(A) below. Of those 12 hours, at least one hour shall be ethics, which may include professionalism as defined by Regulation 3.02. In addition, an attorney or judge may carry over accredited hours in accord with the provisions of Rule 5 (A), including one hour of ethics which may be carried forward to the succeeding reporting period.

(B) This minimum requirement must be met through courses conducted by sponsors approved by the Board, or individual courses that have been approved by the Board, or such other programs, courses, or other educational materials that the Board may approve pursuant to Rule 4.

(C) An hour of continuing legal education shall include at least sixty minutes of instruction, exclusive of meals, introductions, or other noneducational activities.

(D) The Board is authorized and encouraged to consider the requirement of particular course content, such as professional or judicial ethics, as part of the minimum educational requirement. (Amended and substituted July 9, 1990; amended June 27, 1994, effective July 1, 1994; amended Mar. 22, 2001.)

RESEARCH REFERENCES

ALR. Constitutional validity of continuing legal education requirements for attorneys. 97 ALR 5th 457.

Rule 4. Accreditation.

(A) The Board shall be the exclusive authority for accreditation of continuing legal education sponsors or programs. However, the Board may delegate to a subcommittee, in accord with Rule 1(E)(3), the authority to review submissions by new sponsors. Further, the Board may delegate to its Secretary the authority to approve or deny programs submitted by previously accredited sponsors, or by sponsors who have previously had individual program(s) approved by the Board. The Board, through its Secretary, shall provide an annual report to the Arkansas Supreme Court which shall reflect summary information with regard to program approvals or denials, attorney suspension information, and such other matters as the Board may direct.

(B) Approval of Accredited Sponsors:

(1) An organization, or entity, may seek Board designation as an accredited sponsor;

(2) In order to receive such a designation the organization or entity must establish to the satisfaction of the Board that it is regularly engaged in offering continuing legal education and is recognized as a provider of continuing legal education on a national basis;

(3) Subsequent to designation as an accredited sponsor, programs offered by that sponsor outside this State shall be approved provided such courses meet the requirements of Rule 4.(C);

(4) Programs conducted by sponsors accredited in another state or by a national continuing legal education accrediting body may be approved, provided the Secretary is satisfied that the sponsor meets the requirements of this Rule; and,

(5) Accredited sponsors must abide by all reasonable requests for information or course materials from the Board, or its Secretary, and the Board reserves the right to withdraw accredited sponsor designation for failure to meet the requirements of these rules.

(C) Individual Course or Activity Approval:

The Board may, upon application, approve continuing legal education courses or activities provided such courses meet the following standards:

(1) The course must contribute directly to professional competence of attorneys and judges, or to their education with respect to professional or ethical obligations;

(2) Course presenters must have the necessary experience or academic skills to conduct the course effectively;

(3) Prior to, during, or after the course, each each [sic] attendee must be provided with written course materials of a quality and quantity which indicate that adequate time has been devoted to the speaker's preparation and that the written materials will be of value to the attendees in the course of their practice. In the event written materials are not provided before, or during the program, the program will not be subject to preapproval by the Board. In the event materials are submitted after the program, the Board will make a determination as to what, if any, credit shall be given for the course;

(4) The course must be presented in a suitable setting, which provides attendees with adequate writing surfaces, provided that the secretary is satisfied that the course substantially complies with the requirements of Rule 4(C);

(5) During activities presented by means of videotape, audiotape, or other such systems, there must be an opportunity to ask questions of course faculty or a qualified commentator;

(6) The sponsor must encourage participation by attorneys as planners, authors, panelists, or lecturers;

(7) The sponsor must make available to the Board, or its Secretary, upon request, information concerning the course, which might include a list of attendees or individual affidavits signed by attendees, the course brochure, a description of the method or manner of presentation, and a set of all written materials pertinent to the course; and

(8) The course must be subject to evaluation before, during, and after presentation.

(D) The Board is authorized and encouraged to grant approval to all sources of continuing legal education which meet the relevant standards of Rule 4(C), including: publication of law related articles in legal journals; preparation of bar examination materials; preparation for, and conduct of, approved continuing legal education courses; participation in regularly scheduled courses conducted by American Bar Association accredited law schools; and "In House" educational programs conducted by law firms or other law related entities. The Board shall also be authorized to determine the amount of approved hours such activities are worth and may limit the number of such hours that may be applied to the minimum requirement.

(E) It is presumed that sponsor accreditation, or individual program accreditation, will be sought well in advance of the event. However, the Board may accredit a sponsor or individual program after the event.

(F) In the event the Secretary denies approval of an individual course or sponsor, the aggrieved sponsor may, in writing, request that the Board review such denial. (Amended and substituted July 7, 1990; amended October 29, 1990; amended June 27, 1994, effective July 1, 1994; amended June 25, 1998.)

Rule 5. Reporting.

(A) Credit for approved continuing legal education hours will be given for courses or activities conducted from July 1 through June 30 of each year, and for the purposes of these rules, this period of time shall be known as the "reporting period." If an attorney or a judge acquires, during such reporting period, approved continuing legal education in excess of twelve (12) hours, the excess credit may be carried forward and applied to the education

requirement for the succeeding reporting period only. The maximum number of CLE hours one may carry forward is twelve (12), which may include one hour of ethics.

(B) Sponsors may be required to report attendance to the Board or its Secretary. Such reports may be required promptly after completion of each program or activity. Attorneys may also report approved activities using a certificate approved by the Board.

(C) The Board, through its Secretary, shall maintain current records of CLE attendance for each attorney to whom these rules apply. Pursuant to Board regulation, they shall be made available to such attorneys.

(D) During the course of the reporting period, the Board, through its Secretary, may provide interim reports by first class mail to those attorneys subject to the 12 hour requirement of Rule 3.(A). Such reports will state the number of approved CLE hours each attorney has of record with the Board. On or before July 31 after the conclusion of the immediately preceding reporting period, the Board, through its Secretary, shall provide a final report by first class mail to those attorneys. The number of approved CLE hours stated in the interim and final reports shall be presumed correct unless the attorney notifies the Board otherwise. If the final report shows acquisition of 12 or more approved CLE hours during the reporting period, the attorney shall be deemed to be in compliance with these rules and need not take any further action for the immediately preceding reporting period.

In the event the final report reflects that an attorney has failed to meet the 12 hour requirement of Rule 3.(A), the final report will be accompanied by an acknowledgment of deficiency form. Such attorneys shall sign the acknowledgment of deficiency form and file it with the Board on or before the following August 31. Subsequently, such attorneys shall cure any deficiency by December 1 and provide appropriate documentation to the Board no later than the following December 15. CLE hours reported to the Board pursuant to the acknowledgment of deficiency shall first be applied to the deficiency and any remaining hours will be applied to the current reporting period.

Attorney members of the National Guard or reserves of any branch of the Armed Forces which are mobilized during the reporting period by Gubernatorial or Presidential order shall have an additional 180 days to meet each of the respective filing requirements set forth in the preceding paragraph. Such entitlement shall be based upon appropriate documentation to establish the date of mobilization and the date of release from active duty. Upon request of an affected attorney who is entitled to the relief set forth in this paragraph, the Board may grant additional extensions of time in order to meet the respective filing requirements set forth in the preceding paragraphs. The Board may also waive any of the various fees set forth in Regulation 5.01 of the Regulations of the Board.

(E) The Board is authorized to assess costs against delinquent attorneys in the form of a reasonable fee for filing late and filing a deficiency plan.

(F) Newly admitted attorneys shall be subject to the 12 hour minimum requirement during the reporting period that follows the reporting period in which they are admitted.

(G) All filings pursuant to Rule 5 will be made with the Secretary to the Arkansas Continuing Legal Education Board, unless the Board directs otherwise. In addition, all such filings that require the signature of an attorney shall be subject to the requirements of Rule 8.4 of the Model Rules

of Professional Conduct for Lawyers or its successor rule. (Amended and substituted July 9, 1990; amended January 13, 1992, effective March 1, 1992; amended June 27, 1994, effective July 1, 1994; amended December 16, 1996; amended May 6, 2004.)

Rule 6. Noncompliance and sanctions.

(A) If an attorney to whom these rules apply either fails: to file timely the acknowledgement of deficiency or cure the deficiency as required by Rule 5.(D); or, to file timely an out of state certification form in accord with Rule 2.(C), the attorney shall not be in compliance with these rules.

(B) Within 30 days after an attorney fails to comply with any provision of the preceding paragraph, the Board, through its Secretary, shall serve a notice of noncompliance on the affected attorney. Such notice shall be sent by first class mail to the address the attorney maintains with the office of the Arkansas Supreme Court Clerk.

(C) The notice shall contain a statement of the nature of the noncompliance. The attorney must, within 30 days of the date of the notice of noncompliance, provide the Board written evidence that the attorney is either in compliance or has corrected the noncompliance.

(D) If within the allotted time as set out in paragraph 6.(C) above, the attorney fails either to provide written evidence of compliance or that the noncompliance has been corrected, the Board, through its Secretary, shall serve a notice of intent to suspend upon the affected attorney. Such notice shall be mailed to the address the attorney maintains with the Clerk of the Arkansas Supreme Court. The notice shall be sent by certified mail, return receipt requested. Such notice shall apprise the attorney that his or her Arkansas law license shall be considered for suspension at the next regularly scheduled meeting of the Board. Such notice shall be sent at least 20 days prior to that meeting. Upon written request of the attorney, a hearing shall be conducted at that meeting.

(E) Hearing Procedure:

(1) The Board, in the performance of its responsibilities under these rules, shall have the authority to request issuance of summons or subpoena from the Office of the Supreme Court Clerk, and the Clerk shall issue same. Such requests shall be signed by the Chairman of the Board, or its Secretary.

(2) Witnesses may be sworn by the Board Chair or any member acting in his or her stead, or by any individual authorized to administer oaths, and upon request, a record shall be made at the expense of the attorney. Such hearings are civil in nature and the standard for decision is preponderance of the evidence.

(3) The hearing shall be open to the public.

(4) After the hearing, the Board may retire to executive session to deliberate. Thereafter, its decision shall be publicly announced and, if not unanimous, there shall be a statement of votes by individual members.

(5) The Board shall take action by a majority vote of the voting members present.

(F) Authorized Dispositions at Board Meeting Subsequent to Service of Notice of Intent to Suspend.

(1) The Board may dismiss the matter if records in possession of the Board show that the attorney has achieved compliance. However, such

dismissal may be made contingent upon payment of a delinquency assessment as authorized by Rule 5(E) and the regulations adopted pursuant to that rule; or,

(2) The Board may enter an order deferring further action for no more than 90 days to allow the attorney to achieve compliance. Subsequent to the period of deferment, the Board may suspend the attorney in accordance with Rule 6(F)(3), or, dismiss the action in accord with the preceding paragraph, or, take such other permissible actions it may deem appropriate; or,

(3) The Board may suspend the license of the attorney subject to reinstatement pursuant to paragraph 6(H) below. Such suspension shall become effective on the date of filing of the notice and order of suspension with the Arkansas Supreme Court Clerk. (Hereinafter referred to as "The Order of Suspension.")

(G) Promptly after a Board vote of suspension, the Secretary shall notify the affected attorney by way of certified mail, return receipt requested. In addition, the Secretary shall promptly file the order of suspension with the Clerk of the Arkansas Supreme Court and notify Arkansas state judges of general jurisdiction and the United States District Court Clerk.

Attorneys who are suspended may request a stay of such suspension pending a hearing by the Board. Such a request shall be made in conjunction with a petition for reinstatement. The request shall be presented to the Board, through its Secretary, in the form required by Rule 6(H). Such submissions shall be ruled upon by the Board Chairperson, or a member designated by the Chairperson. To be considered for review, the petition for reinstatement and request for stay must either: (a) establish that the attorney had obtained the requisite number of CLE hours, or filed the appropriate documents, to be in compliance on or before the vote of suspension on that attorney; or, (b) confirm that subsequent to the vote of suspension, but prior to filing the petition for reinstatement and request for stay, the attorney had obtained the requisite number of CLE hours to be in compliance or had filed appropriate documents to achieve compliance. Any request for stay of suspension must contain an affirmation by the attorney that he or she has not engaged in the practice of law subsequent to receipt of notification of suspension or actual knowledge of suspension, whichever is earlier.

(H) An attorney who has been suspended pursuant to these rules who desires reinstatement shall file a petition for reinstatement (which in appropriate cases may incorporate a request for stay of suspension) with the Secretary of the Board. The petition shall be sworn and properly acknowledged by a notary public or any official authorized to take oaths. The petition may include the applicant's reason(s) for noncompliance, state that the applicant is presently in compliance, or provide any other material information pertinent to the applicant's petition. The petition must contain an affirmation that the petitioner has not engaged in the practice of law subsequent to receipt of notification of suspension or actual knowledge of suspension, whichever is earlier. The petitioner may request a hearing before the Board. In such case, a hearing will be conducted in accordance with the provisions set out in Rules 6(E) and (F), and Section 6 of the regulations. In the event the attorney is reinstated, the Board may set additional educational requirements as a condition of reinstatement and may assess reinstatement fees and late filing fees consistent with its regulations. (Amended and substituted July 9, 1990; amended January 13,

1992, effective March 1, 1992; amended June 27, 1994, effective July 1, 1994; amended June 27, 2002; amended February 2, 2006.)

RESEARCH REFERENCES

ALR. Discipline of attorney for failure to comply with continuing legal education requirements. 96 ALR 5th 23.

Rule 7. Appeals.

(A) Final determinations as to accreditation of a sponsor by the Secretary or a committee of the Board shall, upon request of the aggrieved sponsor, be reviewed by the Board. There shall be no further review of such determinations.

(B) Final determinations by the Board, which result in suspension of an attorney, may be appealed to the Arkansas Supreme Court. Such appeal shall be heard de novo on the record from the Board proceedings.

(C) To effect an appeal, the suspended attorney shall file the record with the Supreme Court Clerk within thirty days from the entry of order of suspension. The appellant shall bear the cost of record preparation. (Amended and substituted July 9, 1990; amended June 27, 1994, effective July 1, 1994.)

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REGULATIONS OF THE ARKANSAS CONTINUING LEGAL EDUCATION BOARD

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SECTION 1. THE BOARD

Section 1.01. Preface.

These regulations are cumulative to and explanatory of the Arkansas Rules for Minimum Continuing Legal Education (hereinafter the Rules) which were adopted by Per Curiam Order of the Arkansas Supreme Court on March 6, 1989, 298 Ark. Appendix (1989). In the event of a conflict between these regulations and the Rules, the provisions of the Rules shall prevail. Rule 6 of the Arkansas Rules of Civil Procedure shall govern calculation of time whenever an action is required to be taken under the Rules or these Regulations unless otherwise provided. Members of the Arkansas Continuing Legal Education Board (hereinafter Board) and the Secretary to the Board (hereinafter Secretary) shall be absolutely immune from suit for all conduct in the course of their official duties in connection with the administration of the Arkansas Minimum Continuing Legal Education Program (hereinafter CLE).

Rule 1.02. Rules of procedure.

All proceedings by the Board will be conducted pursuant to Roberts Rules of Order.

Rule 1.03. Meetings.

Meetings will be called as to date, time and place by the Chairman or by five Members of the Board.

Rule 1.04. Official forms.

The Secretary is authorized to develop appropriate forms, verification procedures, and other administrative procedures as necessary to efficiently administer the CLE program.

Rule 1.05. Prior board rulings.

The Secretary shall maintain an index of rulings of the Board, which are not implemented as regulations, and shall make such rulings available to potential sponsors or attorneys upon request.

Rule 1.06. Removal of members.

Upon good cause shown, which may include failure to attend meetings on a regular basis, the Board may recommend to the Arkansas Supreme Court that a Board member be removed from office. Upon such recommendation, the Court may declare the position vacant and appoint a replacement pursuant to Rule 1(C).

Rule 1.07. Records retention.

The Board shall maintain all records in connection with the CLE Program for a period of three (3) years after each approved CLE course or activity is concluded. Further, where Accredited Sponsors have submitted documentation pursuant to Rule 4(B)(2), the Board may discard such documentation after three (3) years, after acquiring satisfactory evidence that the accredited sponsor continues to conduct programs which meet the requirements of Rule 4(C). Fiscal records pertaining to the CLE Program shall be maintained by the Board for a period of five (5) years.

Rule 1.08. Sponsor records.

Accredited or individual course sponsors shall maintain course records in connection with programs which have been approved by the Board. These records shall be maintained in the possession of the sponsor for a period of one (1) year after the program or activity. Such records shall include: the course outline or brochures; all written materials; the faculty information; the evaluations; and, the attendance records.

Rule 1.09. Amendment.

These regulations may be amended by a majority vote of the Board, subject to subsequent approval by the Arkansas Supreme Court. (Per

Curiam July 9, 1990; amended January 13, 1992, effective March 1, 1992; amended June 27, 1994, effective July 1, 1994.)

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SCOPE

Rule 2.01. Non-resident attorneys.

An attorney's residence is presumed to be the address the attorney maintains with the Office of the Arkansas Supreme Court Clerk. Attorneys who maintain Arkansas licenses, but reside outside this State and are licensed in the state of their residence, are required to meet the minimum continuing legal education requirements of their resident state. Arkansas licensed attorneys residing in a state which requires continuing legal education but who are not licensed in that state, are inactive in that state, or for any other reason are denied the opportunity to participate in the continuing legal education programs of that state, are considered in compliance with the requirements of their resident state. However, such attorneys who return to the practice of law in Arkansas shall be required to acquire thirty-six (36) hours of approved CLE courses by the end of the first reporting period that succeeds the reporting period in which they return. Notwithstanding this provision, the attorney may choose to remain current in Arkansas pursuant to Rule 2(C). Attorneys who move from a state which does not require minimum continuing legal education to a state other than Arkansas which does require minimum continuing legal education are required to meet the requirements of that state. (Amended November 30, 2006.)

Rule 2.02. Inactive status.

The practice of law shall be defined as any service rendered, regardless of whether compensation is received therefor, involving legal knowledge or legal advice. It shall include representation, provision of counsel, advocacy, whether in or out of court, rendered with respect to the rights, duties, regulations, liabilities, or business relations of one requiring the legal services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document, or law. Inactive attorneys may not, at any time, or in any manner, hold themselves out as lawyers to the general public. Nonetheless, it shall not be considered the practice of law for attorneys to represent themselves or family members to the third degree of consanguinity. (Per Curiam July 9, 1990; amended June 27, 1994, effective July 1, 1994; amended January 1, 2007.)

SECTION 3.

MINIMUM REQUIREMENTS

Rule 3.01. Enhanced credit.

(1) *Solo Speakers.* An attorney who presents a speech or program at an approved CLE course shall be allowed four (4) hours credit for each hour of the initial presentation and two (2) hours credit for each hour of each subsequent presentation of the same material.

(2) *Panel Discussions.* A participant in a panel presentation shall receive three (3) hours credit for every one (1) hour of the panel presentation in which he or she participates.

(3) *Question and Answer Sessions.* Question and answer sessions following individual or panel presentations shall be counted as part of the presentation time for which credit is to be given.

(4) *Written Materials.* To serve as a basis upon which credit for an individual or panel presentation is given, accompanying written materials must comply with Rule 4(C)(3). (Amended January 22, 2009.)

Rule 3.02. Ethics.

Ethics presentations shall be distinct segments no less than one hour in length, shall be specifically designated separately on the program application and shall be accompanied by appropriate documentation. Likewise, claims for ethics credit shall be designated separately on certificates of attendance submitted to the Secretary.

Ethics shall be defined as follows: "Legal ethics includes, but is not necessarily limited to, instruction on the Model Rules of Professional Conduct and the Code of Judicial Conduct."

Ethics may include professionalism courses addressing the principles of competency, dedication to the service of clients, civility, improvement of justice, advancement of the rule of law, and service to the community.

Professionalism courses may include a lawyer's responsibility as an officer of the Court; responsibility to treat fellow lawyers, members of the bench, and clients with respect and dignity; responsibility to protect the image of the profession; responsibility generally to the public service; the duty to be informed about methods of dispute resolution and to counsel clients accordingly; and misuse and abuse of discovery and litigation.

Legal ethics does not include such topics as attorney fees, client development, law office economics, and practice systems except to the extent professional responsibility is directly discussed in connection with these topics.

In accord with Rule 2(C) non-resident attorneys shall not be subject to the one hour ethics requirement set forth in Rule 3(A) except insofar as their resident state require ethics credits. (Amended Mar. 22, 2001.)

Rule 3.03. Hardships.

In cases of extreme hardship due to mental or physical disability which substantially inhibit the ability of an attorney or Judge to participate in extended seminar presentations, the Secretary shall, in cooperation with the affected party, develop an appropriate program of substituted compliance. Such programs shall, to the extent possible, comply with relevant sections of Rule 4(C) and must be approved by the Board. (Per Curiam July 9, 1990; amended June 27, 1994, effective July 1, 1994.)

SECTION 4. ACCREDITATION

Rule 4.01. Accredited sponsors.

The Secretary of the Board shall keep a current list of accredited sponsors and include thereon the date of accreditation by the Board, current address, and phone number of each sponsor.

Rule 4.02. Program adjustments.

(1) The Secretary is authorized to make adjustments in the number of approved CLE credit hours or approved substitute program content where, during the presentation of a program previously approved by the Board, there is a deviation from the program content or length. If a program segment is abbreviated due to illness or other emergency and is 90% or more completed, it shall be given full credit. Otherwise, the credit time allowed for that particular program segment shall be adjusted to the nearest one-quarter ($\frac{1}{4}$) hour. In such event it is the obligation of the sponsor to notify attendees immediately and amend the certificates of attendance, if possible, and when submitting the certificates of attendance, advise the Secretary of the diminished hours available for the particular program segment in question.

(2) The Secretary is authorized to adjust hours when determining the number of hours for which programs are to be submitted for credit. In such cases courses are to be adjusted to the nearest one-quarter ($\frac{1}{4}$) hour.

(3) In addition, it is the obligation of the Sponsor to notify attendees immediately when any previously approved program segment fails to meet the minimum course standards set out in Rule 4(C) and advise the attendees that credit may not be available for that particular program segment due to the deficiency. The Sponsor shall also notify the Secretary of such deficiencies.

Rule 4.03. Reciprocal accreditation — Individual attendance.

Upon receipt of a completed certificate of attendance form or other documentation by the Secretary from an Arkansas attorney confirming attendance at an out-of-state continuing legal education program approved by the situs state, the attorney shall be entitled to CLE credits in Arkansas. The Secretary shall verify the program's approval by the situs state's continuing legal education agency.

Rule 4.04. Approved CLE activities.

(1) [Abolished, effective July 1, 1998.]

(2) *Authorship of Law Articles.* In accordance with objective standards to be developed and applied by the Board, up to twelve (12) hours of credit may be earned through the authorship of a law related article published by an American Bar Association accredited law school, a state bar journal, an official publication of the American Bar Association, or through authorship of a published book on legal matters. Any attorney may petition the Board

for credit for the authorship of an article or book. Entitlement to credit will accrue as of the date of publication of the article or documented date of acceptance for publication.

(3) *Law School Courses.* Credit may be earned through part-time teaching, formal enrollment for credit, or official audit and attendance at a course offered by a law school accredited by the American Bar Association. Twelve (12) credit hours will be awarded for each academic credit hour taught, officially audited, or successfully completed, provided the applicant certifies attendance of at least seventy-five percent (75%) of the class sessions. For the purpose of this regulation, "part-time teaching" is defined as teaching one course which awards four or fewer hours of academic credit.

(4) *In-house Programs.* In-house programs are available as a means of acquiring CLE credits provided:

(a) The program complies with Rule 4(C) of the Arkansas Rules for Minimum Continuing Legal Education; and,

(b) The application and documentation for in-house programs conducted in Arkansas must be submitted to the Secretary in advance of the scheduled event and be approved thirty (30) days before the scheduled event.

In addition, private law firms which conduct in-house programs shall be subject to the following requirements:

(c) A minimum of three (3) 'out-of-firm' attorneys must be allowed to attend such programs. Each firm may set reasonable limits on the total number of such 'out-of-firm' attendees.

(d) Any "out-of-firm" attorney who desires to attend an in-house CLE program may be responsible for a proportionate share of the costs of the program; and,

(e) Attorneys may receive a maximum of six (6) hours CLE credit for in-house programs conducted during any reporting period.

(5) *Satellite Programs.* All satellite television programs which otherwise comply with the Rules may be approved.

(6) *Video Programs.* Video CLE programs are an acceptable means of obtaining CLE credits, provided:

(a) The original program upon which the video replay is based has been approved by the Board;

(b) The program must have the original faculty members present or the original faculty members must make known their addresses or phone numbers in order that they can respond to written or phoned inquiries subsequent to the program; and

(c) There must be a moderator present.

(7) *Live Telephone Conferences.* CLE programs presented via live telephone conferences and live computer interactive programs are acceptable provided such programs comply with relevant portions of Rule 4.(C). For the purpose of this regulation, 'live' means that the attorney is participating in the CLE program contemporaneous with its live presentation.

(8) *Short Courses.* No course shall be approved unless it contains at least one continuous hour of instruction accompanied by written materials consistent with Rule 4(C)(3), and is conducted in a suitable educational environment.

(9) *Advance Sheet Review Groups.* Programs consisting of review of advance sheet court opinions shall be approved, provided written materials consisting of analysis in addition to the advance opinions themselves, are provided by the persons responsible for the discussion of a case or cases, and

regular and special group meeting times and places are published to the Board at least two weeks in advance to assure compliance with the evaluation requirement of Rule 4(C)(8). (Amended April 16, 1998, effective July 1, 1998; amended November 30, 2006.)

Rule 4.05. Unapproved CLE activities.

(1) *Public presentations.* No CLE credits are available for attorneys speaking or presenting any program to the lay public without prior approval of the Board.

(2) *Self-study.* Self-study courses are not approved as a means of acquiring CLE credits.

(3) *Audio Tapes.* Audio tape programs are not approved as a means of acquiring CLE credit.

(4) *Law Professors.* No full-time or adjunct law school professors may obtain CLE credits for teaching regularly scheduled courses, subject to the exception of Regulation 4.04(3).

(5) *Law Firm Operations.* Individual programs which deal solely with the internal financial operations of a law firm will not be considered acceptable as a means of acquiring CLE credits in Arkansas. (Per Curiam July 9, 1990; amended April 1, 1991; amended January 13, 1992, effective March 1, 1992; amended June 27, 1994, effective July 1, 1994.)

SECTION 5. REPORTING — FEES

Rule 5.01. Late filings/deficiency plans.

After a reporting period has ended, and at any time prior to a vote of suspension by the Board, an attorney may file:

(1) Documentation to establish compliance with the provisions of Rule 3(A). If filed between July 1 and August 31, such documentation shall be accompanied by a deficiency fee of \$75.00 if the documents submitted are for CLE credits acquired after July 1;

(2) An acknowledgment of deficiency form. If filed between July 1 and August 31, such a filing shall be accompanied by a deficiency fee of \$75.00;

(3) An acknowledgement of deficiency, if filed after August 31, shall be subject to the \$75.00 deficiency fee set out in paragraph (2) above, and a late filing fee of \$25.00. After timely filing of an acknowledgment of deficiency and payment of the required fee, no late filing fee will be assessed for hours submitted to cure timely the deficiency. However, documentation of hours obtained after December 1 to cure a deficiency shall be accompanied by a late filing fee of \$100.00. Documentation to establish compliance with Rule 3(A) for CLE credits acquired before July 1, but filed after August 31, shall be subject to a \$25.00 late filing fee;

(4) An out of state certification pursuant to Rule 2(C); or, an inactive renewal pursuant to Rule 2(D). Such filings shall be accompanied by a late filing fee of \$25.00 if filed after October 31; and,

(5) Documentation tendered in accord with the preceding paragraphs will not be accepted unless accompanied by the appropriate filing fee and unless all other applicable requirements have been met.

Rule 5.02. [Payment of fees].

All fees shall be made payable to the Bar of Arkansas. (Per Curiam July 9, 1990; amended January 13, 1992, effective March 1, 1992; amended June 27, 1994, effective July 1, 1994.)

Publisher's Notes. The heading for Regulation 5.02 was inserted by the publisher.

SECTION 6. HEARING PROCEDURES/OSANCTIONS

Rule 6.01. [Procedure and fees].

(1) In the absence of the Chairman of the Board, the remaining voting members of the Board shall elect from among its number, by a majority vote, a presiding officer for the hearing in question.

(2) The expense of a court reporter's attendance, if a record is requested, shall be paid by the affected attorney.

(3) The burden of proof as to compliance with the Rules shall remain with the attorney.

(4) Not less than ten days before a hearing, at the request of either the Board or the attorney, each shall apprise the other of the names, addresses, and phone numbers of witnesses and provide copies of all exhibits each intends to present at the hearing.

(5) The Rules of Evidence shall apply subject to the exercise of reasonable discretion by the majority of the Board.

(6) In addition, pursuant to Rule 6, the Board may assess a reinstatement fee not to exceed TWO HUNDRED FIFTY DOLLARS (\$250.00). Such fees shall be payable to the Bar of Arkansas. (Per Curiam July 9, 1990; amended June 27, 1994, effective July 1, 1994.)

Publisher's Notes. The heading for Regulation 6.01 was inserted by the Publisher.

RESEARCH REFERENCES

ALR. Discipline of attorney for failure to comply with continuing legal education requirements. 96 ALR 5th 23.

SECTION 7. APPEALS

Rule 7.01. Right to review.

An attorney who is suspended by the Board shall have the right to review of the ruling by the Arkansas Supreme Court.

Rule 7.02. Obtaining the record.

To effect such a review, the suspended attorney, within ten (10) days of receipt of notice of suspension shall, in writing, request a copy of the record of the proceedings from the Secretary. Such record shall include all perti-

nent documents on file with the Board and the transcript of any pertinent hearings conducted by the Board. The Secretary shall promptly respond to such requests. The Secretary shall deliver, by registered mail, a single copy of such record to the suspended attorney.

Rule 7.03. Costs.

The suspended attorney shall be responsible for the costs attendant to record preparation and filing, including the expense of preparing the transcript of any hearings.

Rule 7.04. Filing.

Thereafter, the suspended attorney shall have ten (10) days from receipt of the record to file same with the Clerk of the Arkansas Supreme Court. A single copy of the record shall be filed, accompanied by eight (8) copies of the attorney's motion for further review by the Arkansas Supreme Court. The motion and record shall be filed pursuant to Arkansas Supreme Court Rule 2-1, and the Clerk's Office will process such motions for review pursuant to procedures established under said Rule 2-1, or its successor rule.

Rule 7.05. Memorandum.

The suspended attorney may accompany the motion with a brief memorandum setting out grounds for reversal of the decision of the Continuing Legal Education Board. The Board may file a response as authorized by Rule 2-1.

Rule 7.06. Decision by the Arkansas Supreme Court.

The findings of the Board shall not be reversed unless the Arkansas Supreme Court finds them to be clearly erroneous. The Arkansas Supreme Court shall review the case de novo upon the record presented. (Per Curiam July 9, 1990; amended June 27, 1994, effective July 1, 1994.)

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ALBERTA GOVERNMENT
OFFICE OF THE ATTORNEY GENERAL

IN RE: [Name]
[Address]
[City, Province, Canada]
[Phone Number]

TO: [Name]
[Address]
[City, Province, Canada]
[Phone Number]

FROM: [Name]
[Address]
[City, Province, Canada]
[Phone Number]

PROCEDURES OF THE ARKANSAS SUPREME COURT REGULATING PROFESSIONAL CONDUCT OF ATTORNEYS AT LAW

Section

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26. Expungement of dismissals.
27. Contempt.
28. Attorney trust account and automatic "overdraft" notification procedure.

Publisher's Notes. The former rules for the regulation of professional conduct of attorneys, which were adopted June 21, 1976, and became effective July 1, 1976, were probably overruled and superseded by the rules regulating the professional conduct of attorneys adopted by Per Curiam order on March 11, 1985.

Another set of Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law were adopted on a trial basis by the Supreme Court by Per Curiam Order dated July 16, 1990.

Another set of Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law were adopted by Per Curiam on January 8, 1998, effective January 15, 1998.

The Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law were revised by Per Curiam on July 9, 2001, effective January 1, 2002. Section 28 was adopted February 21, 2002, effective July 1, 2002.

Section 1. Scope.

A. Purpose. These Procedures are promulgated for the purpose of regulating the professional conduct of attorneys at law and shall apply to complaints filed and formal complaints instituted against attorneys after the effective date of these procedures, and within the purview of the jurisdiction and the authority of the Supreme Court Committee on Professional Conduct. From the effective date hereof, these Procedures shall apply to transfers to inactive status, to reinstatements, and to the extent that limitations and special requirements pertain, to attorneys presently suspended, disbarred or who have surrendered their law licenses. Every attorney now or hereafter licensed to practice law in the State of Arkansas shall be a member of the Bar of this State and subject to these Procedures.

The jurisdiction of the Supreme Court Committee on Professional Conduct shall extend to lawyers in active, inactive or suspended status.

B. *Rules of professional conduct adopted.* The court has adopted the Model Rules of Professional Conduct of the American Bar Association, as amended, as the standard of professional conduct of attorneys at law. An attorney who violates any provision of the Model Rules, or these Procedures, shall be subject to the provisions herein.

C. *Nature of proceedings.* Disciplinary proceedings are neither civil nor criminal but are sui generis.

D. *Repealer.* To the extent that former rules or existing provisions of the Arkansas Code Annotated are in conflict with these Procedures, they are hereby overruled and superseded. These Procedures shall not be deemed exclusive of, but supplemental to those provisions of the Arkansas Code Annotated that are not in conflict herewith.

CASE NOTES

Cited: Ligon v. Walker, 2009 Ark. 136, 297 S.W.3d 1 (2009).

Section 2. Definitions.

As used in these Procedures, unless the context otherwise requires:

A. "CLERK" means the Clerk of the Arkansas Supreme Court.

B. "COMMITTEE" means the Supreme Court Committee on Professional Conduct.

C. "COMPLAINANT" means the person(s) initiating a complaint, or the Committee when acting at its own instance or on behalf of another in initiating a complaint.

D. "COMPLAINT" means an inquiry, allegation, or information of whatever nature and in whatever form received by or coming to the attention of the Office of Professional Conduct or the Committee and concerning the conduct of a person subject to the jurisdiction of the Committee.

E. "FORMAL COMPLAINT" means a complaint directed to an attorney by the Office of Professional Conduct setting forth the alleged violation(s) of the Model Rules and informing the attorney of the right to file a written response.

F. "LESSER MISCONDUCT" is defined in Section 17(C).

G. "MODEL RULES" means the Model Rules of Professional Conduct of the American Bar Association, as amended, and any statutory provisions or rules adopted by the Arkansas Supreme Court regulating the professional conduct of attorneys at law.

H. "OFFICE OF PROFESSIONAL CONDUCT" means the staff office managed and supervised by the Executive Director, which is responsible for receiving and investigating all complaints concerning members of the Arkansas Bar, presenting cases before the Committee panels, and litigating cases from the Committee before any court of this state.

I. "RESPONDENT" or "RESPONDENT ATTORNEY" means an attorney against whom a formal complaint has been initiated whether or not the attorney has failed to file a written response.

J. "SERIOUS CRIME" means any felony or any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or any crime a necessary element of which, as determined by

the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a “serious crime.”

K. “SERIOUS MISCONDUCT” is defined in Section 17(B).

L. “SUBSTANTIAL” when used for the purposes of these procedures in reference to degree or extent, means beyond mere suspicion or conjecture and of sufficient force and character to compel a conclusion one way or another with reasonable and material certainty and precision.

M. “UNAVOIDABLE CIRCUMSTANCES” means circumstances not attributable to negligence, carelessness, fault, or the lack of diligence on the part of the respondent attorney.

CASE NOTES

Serious Crime.

Under subsection (J) of this section, any felony constitutes a serious crime; whereas, any lesser crime will constitute a serious crime only if it reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Upon receiving a certified copy of an attorney’s judgment of conviction for felony DWI, the Arkansas Supreme Court Committee on Professional Conduct was authorized under Ark. Sup. Ct. Prof. Conduct P. §§ 16(A)(2) and 17(E)(3)(b) to temporarily suspend the attorney’s license to practice law because (1) a felony conviction constituted a serious crime under subsection (J) of this section; and (2) pursuant to Ark. Sup. Ct. Prof. Conduct P. § 15(C)(3), the copy of the judgment was conclusive evidence of the attorney’s guilt. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Where an attorney, after his license was temporarily suspended due to his felony conviction for DWI, held himself out as a landlord’s attorney, advised the landlord’s tenant that the tenant had to vacate leased premises, and represented the landlord at a city council

meeting concerning a condemnation matter, the attorney was disbarred pursuant to Ark. Sup. Ct. Prof. Conduct P. § 13(D) because the special judge did not clearly err in concluding (1) that the DWI conviction constituted a serious crime under subsection (J) of this section; (2) that the attorney violated Ark. R. Prof. Conduct § 8.4(b); and (3) that the attorney’s DWI conviction and unauthorized practice of law in violation of § 16-22-501(a)(2) constituted serious misconduct under Ark. Sup. Ct. Prof. Conduct P. § 17(B). *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Supreme Court Committee on Professional Conduct erred in cautioning an attorney after it found that he violated Ark. R. Prof’l Conduct 8.4(b) by illegally possessing a controlled substance, methamphetamine, a Class C felony and “serious crime” as defined by subdivision (J) of this section and Ark. Sup. Ct. Prof. Conduct P. § 17(B)(6), because the attorney committed serious misconduct, and the sanction of caution was not available; Ark. Sup. Ct. Prof. Conduct P. § 17(E)(5) states that a caution is appropriate for lesser misconduct. *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011).

Section 3. Committee on Professional Conduct.

A. Composition; Term of Office.

(1) The Supreme Court shall appoint the members of the Committee on Professional Conduct to assist in enforcing these Procedures. The Committee shall consist of two separate seven-member panels. Each panel will be comprised of five attorneys, one chosen from the State at large and one from each of the four Congressional Districts. Two non-attorneys will be chosen to serve on each panel, and these four lay members will be chosen from the State at large. Members shall not be permanently assigned to a particular panel, but the composition of the panels shall rotate among the members from time to time. Each appointment shall be for a term of six years unless otherwise designated by the Supreme Court. Members may be reappointed to one successive six-year term. Terms shall be staggered. Vacancies

occurring from causes other than expiration of term of office will be filled by the Supreme Court as they occur, and the person so appointed shall serve the remainder of his or her predecessor's term. Committee members shall serve until their successors are appointed and certified. The Committee shall elect one of its members as Chairperson and another as Secretary. The Committee, consistent with the provisions herein, may adopt such internal, operating rules and policies as may be necessary to facilitate the performance of its duties, responsibilities, and administrative functions.

(2) Members shall refrain from taking part in any disciplinary proceeding in which a judge similarly situated would be required to recuse.

(3) Seven reserve members shall be appointed to serve as a pool from which replacements may be drawn in those instances in which members of the Committee are disqualified or unable to serve. Five of the reserve members shall be lawyers with at least one from each Congressional District. Two of the reserve members shall not be lawyers and shall be selected from the State at large. In other respects, the terms of service for reserve members shall be the same as provided for the Committee. Reserve members shall possess the authority, powers, immunities and entitlements as provided for the Committee by these Procedures, and which are necessary and appropriate for the discharge of their duties and function. The Committee Chairperson or Executive Director shall appoint reserve members to serve, individually or collectively as the situation requires, in those instances in which members of a panel of the Committee consider themselves disqualified or are unable to serve. Reserve members serving as replacements shall be selected so as to maintain the appropriate lawyer/non-lawyer composition. Reserve members do not have to be selected unless the required quorum of the Committee or a panel thereof is not present. If necessary, the Supreme Court may appoint additional persons to serve as reserve members to permit the Committee to discharge its duties.

B. *Quorum.* A majority of the Committee shall constitute a quorum for the conduct of Committee business, but the Committee shall not sit en banc for disciplinary proceedings. When the Committee is authorized to act in a seven-member panel, five members shall constitute a quorum.

C. *Authority; Powers.*

(1) The Committee, through its panels, shall have, and is hereby granted, authority to impose any sanctions deemed appropriate as provided in Section 7 (Procedure), Section 17 (Sanctions), and Section 18 (Fines, Costs, and Restitution).

(2) The Committee, through its panels, is hereby authorized to take action by written ballot subject to the requirements and limitations set out in Section 10 of these Procedures.

(3) The Committee, through its panels, is authorized to conduct hearings at either:

(a) The request of the panel; or

(b) The request of the respondent attorney after written ballots are taken.

(4) The Committee is authorized to hold meetings to conduct the business of the Committee which consists of, but is not limited to, the election of officers, the determination of pending complaints, and such administrative matters as required.

(5) The Committee shall have the authority to employ, with the consent of the Supreme Court, an Executive Director who will not be a member of the

Committee, and shall not have a vote on any matter presented to the Committee for decision. The Committee, acting through its Chairperson, may temporarily employ or designate from the staff attorneys of the Office of Professional Conduct an acting Executive Director in any case in which the Executive Director or the Senior Staff Attorney (pursuant to Section 5(D)(3)) is unable to act, or recuses, or disqualifies.

(6) The Committee shall maintain a permanent office under the supervision of the Executive Director for the conduct of its business and the maintenance of the various records of the Committee.

(7) The seal heretofore adopted by the Committee shall be the official seal for its use in the performance of the duties imposed by these Procedures.

(8) The Committee, through its panels as described herein, shall have the authority to issue summonses for any person(s), or subpoenas for any witness(es), including the production of documents, books, records, or other evidence, in the same manner as is provided for civil process pursuant to the Arkansas Rules of Civil Procedure, requiring the presence of any person, or the attendance of any witness before the Committee for the purpose of testimony, or in furtherance of an investigation. Such process shall be issued under the seal of the Committee provided for in subsection C(7) of this Section and be signed by the Chairperson of the Committee, Secretary, the chair of a panel of the Committee or by the Executive Director. Any subpoenas issued herein shall clearly indicate that the subpoenas are issued in connection with a confidential investigation under these Procedures and that it is regarded as contempt of the Supreme Court for a person subpoenaed to breach the confidentiality of the investigation. If found to be in contempt of the Supreme Court under these Procedures, a person may be punished by incarceration, imposition of a fine, or both. In addition, it shall be grounds for discipline under these Procedures for a subpoenaed attorney to breach the confidentiality of the investigation. It shall not be regarded as a breach of confidentiality for a person subpoenaed to seek or consult with legal counsel in regard to the subpoena, nor shall the confidentiality apply to subpoenas issued in connection with a public hearing.

(9) The Committee, through the Chairperson, a panel chair, or the Executive Director, may seek immunity from criminal prosecution for a reluctant witness, using the procedure of Ark. Code Ann. §§ 16-43-601 to 606 (1987).

(10) The Committee may propose rules of procedure for lawyer discipline and disability proceedings for promulgation by the Supreme Court, and comment on existing and proposed rules.

(11) The Committee shall periodically review the operation of the system with the Supreme Court.

(12) The Committee, working with the Office of Professional Conduct, shall inform the public about the existence and operation of the system and the disposition of each matter in which public discipline has been imposed, a lawyer has been transferred to or from disability inactive status, or a lawyer has been reinstated. Communication options should include toll-free telephone and the Internet.

(13) The Committee shall perform administrative oversight over the Office of Professional Conduct which shall include: reviewing the productivity and efficiency of the office; assessing caseload management; reviewing and making recommendations concerning budgetary matters; making recommendations to the Executive Director; and improving the statistical

records of the office. Administrative responsibilities may be delegated to panels of the Committee on a rotating basis, which may include an Executive Committee selected by the Committee.

(14) When so requested by a Federal Judge under the Uniform Federal Rules of Disciplinary Enforcement adopted by the United States District Courts of Arkansas on May 1, 1980, or successor rules, the Committee may act as the disciplinary agency and the Executive Director as counsel in a federal disciplinary action. Any additional expense incurred in the processing of a federal complaint will be paid from the funds arising from the assessments levied pursuant to the Uniform Federal Rules and available for that purpose. When final action is taken under a federal complaint, a report of that action will be made to the Federal Judge who referred the matter, and the Committee may also furnish to the Federal Judge any other information from its files necessary to fulfill its duties as disciplinary agency.

D. *Immunity.* The Committee, its individual members, Executive Director and employees and agents of the Committee are absolutely immune from suit or action for their activities in discharge of their duties hereunder to the full extent of judicial immunity in Arkansas.

E. *Expenses.* From the funds established and appropriated by the Arkansas Supreme Court and in accordance with budgetary limitations, members of the Committee shall be entitled to receive their travel and hotel expenses, reimbursement for postage, stationery, communications, an attendance allowance, other incidental expenses including stenographic bills and court costs chargeable against them, and to attend training and continuing education programs. All such items shall be paid by the Clerk by check on such funds. Accounts must be itemized and certified by the Chairperson, Secretary, or the Executive Director of the Committee as true and correct.

Section 4. Committee panels.

A. *General.* The Committee may delegate to panels composed of less than the full membership of the Committee the power to act for the Committee in discharging the powers and duties hereunder. Specifically, the Chairperson of the Committee shall appoint seven-member hearing panels. The Chairperson of the Committee shall also (i) establish the rotation by which members are assigned to panels, (ii) establish the rotation by which panels are assigned complaints; and (iii) designate the chairs for panels.

B. *Appointment.* Each panel shall consist of five lawyer-members of the Committee and two non-lawyers. A lawyer member of each panel shall be appointed its chair by the Chairperson of the Committee. A panel member whose term has expired may continue to serve on any case that was commenced before the expiration of the member's term. Five members shall constitute a quorum. The panel shall act only with the concurrence of at least four members. Reserve members may be appointed to serve on a panel pursuant to Section 3(A)(3).

C. *Powers and Duties.* Panels shall have the following powers and duties:

(1) To conduct proceedings during the ballot phase concerning formal complaints of misconduct, petitions for reinstatement, and petitions for transfer to and from disability inactive status;

(2) To conduct hearings;

- (3) To adopt written findings of fact, conclusions of law, and recommendations prepared with the administrative assistance of the Office of Professional Conduct; and
- (4) To discharge other duties imposed by these Procedures.

Section 5. Office of Professional Conduct.

A. *General.* The Executive Director of the Office of Professional Conduct shall be an attorney actively licensed to practice law in the State of Arkansas, shall serve at the will of the Court, and shall devote full time and effort to promptly and efficiently perform the duties stated in this Section, and such other duties as directed by the Committee.

B. Duties-Office.

(1) The Executive Director may attend and, at the request of the Committee, act as counsel in presenting testimony and other evidence at any hearing pursuant to these Procedures.

(2) The Executive Director, or in his or her absence or disqualification from a case the acting Executive Director, shall have power to administer oaths in all matters incident to the duties imposed by these Procedures and such power and authority shall be coextensive with the State.

(3) The Executive Director shall be responsible for the administration of the business office and the security of the records. As authorized by and upon such terms as the Committee shall direct, the Executive Director may employ such personnel, including, staff attorneys, investigators, temporary employees, and retain independent counsel, as may be required to perform the administrative, investigative or legal functions of the Committee. The Executive Director and the professional staff of the Office of Professional Conduct shall periodically attend training and continuing education programs.

(4) The Executive Director shall receive reports from financial institutions pursuant to Model Rule 1.15(d)(1) indicating that a properly payable instrument has been presented against a lawyer's trust account containing insufficient funds, irrespective of whether or not the instrument is honored, and take appropriate action in response to such information.

C. Duties-Complaints.

(1) It shall be the duty of the Office of Professional Conduct to receive and investigate all complaints against any member of the Bar. Such complaints shall be docketed and assigned a permanent file number. The Office of Professional Conduct and the Committee may accept and treat as a formal complaint any writing signed by a judge of a court of record in this State regardless of whether such signature is verified.

(2) The Executive Director may refer matters involving lesser misconduct as defined in Section 17(C) to alternatives-to-discipline programs approved by the Supreme Court. Such programs may include, in addition to the Arkansas Lawyers Assistance Program, programs for fee arbitration, arbitration, mediation, law office management assistance, psychological counseling, continuing education, and ethics.

(3) Upon a determination by the Executive Director that a complaint sets out allegations falling within the purview of the Committee, and those allegations are supported by sufficient evidence, the Executive Director shall provide any assistance needed in the preparation of the complainant's affidavit, and shall process a formal complaint pursuant to the procedures of the Court and the Committee.

(4) If a complaint does not set forth sufficient grounds to reasonably support preparation of a formal complaint but contains information indicative of a misunderstanding or controversy between an attorney and a client or a third party who may be aggrieved by the conduct or circumstances, and the best interests of the integrity of the profession and the valid concerns of the complainant would be served by reconciliation or communication between the parties, the Executive Director may, at the request of the complainant or in the judgment of the Executive Director, contact the attorney by telephone or letter advising the attorney of the nature of the complaint. The aforementioned procedure will not be considered a formal complaint.

(5) Review of the Executive Director's Decision.

(a) A complainant, who is not satisfied with the Executive Director's determination that the allegations of the complaint fall outside the purview of the Committee or that the allegations are not supported by sufficient evidence to file a formal complaint, may request a review of that determination.

(b) The request for review shall be filed with the Executive Director in writing within twenty (20) days from the date of mailing of the letter notifying the complainant of the determination of the lack of a basis for filing a formal complaint.

(c) The written request will set out in general terms the complainant's grounds for objection to the Executive Director's decision.

(d) Upon receipt of a request for review, the Executive Director will acknowledge in writing the request, and shall forward the complaint information to the Chairperson of the Committee on Professional Conduct for review.

(e) The Chairperson of the Committee shall forward copies of the Complaint provided by the Executive Director to five members of the Committee, one of whom will be a nonlawyer, directing that they review the Executive Director's disposition of the matter.

(f) The reviewing members, by majority vote, may approve the Executive Director's disposition of the matter, direct that an affidavit of formal complaint be prepared, or request further investigation of the matter by the Executive Director. Votes may be taken by written ballots on forms supplied by the Office of Professional Conduct or by telephone. With the administrative assistance of the Office of Professional Conduct, the result of the vote will be made known to the Chairperson of the Committee and the Executive Director by a member of the five-member reviewing body. If a formal complaint is instituted, members of the five-member reviewing body shall not participate in subsequent proceedings in the matter.

(g) The Executive Director shall then notify the complainant in writing of the results of the review and dismiss the complaint, initiate a formal complaint, or request additional information as appropriate.

(h) There shall be no further review or appeal of the Committee's final decision.

D. Staff Attorneys.

(1) All Staff Attorneys employed by the Executive Director shall be actively licensed to practice law in the State of Arkansas.

(2) Staff Attorneys shall serve at the direction and pleasure of the Executive Director and may perform all duties and possess all authority of the Executive Director as the Executive Director may delegate except for the

final determination of sufficiency of formal complaints, and the authority and responsibilities provided in Sections 3(C)(8) (subpoenas) and 5(B)(2) (oaths), which authority may be exercised by the acting Executive Director in the absence of or upon the disqualification from a case by the Executive Director.

(3) In the event of the temporary inability of the Executive Director to fully discharge the duties of office, or when a vacancy exists in that office, the Senior Staff Attorney shall discharge such duties as the acting Executive Director. If the Executive Director determines that a conflict of interest exists for the Executive Director with regard to a particular complaint, complainant, or respondent, the Executive Director may recuse from the matter and the Senior Staff Attorney shall discharge such duties as the acting Executive Director for that matter.

E. *Compensation; Expenses.* The Executive Director and staff of the Office of Professional Conduct shall be paid such reasonable salary and expenses as deemed necessary and appropriate by the Committee. Employee salaries, benefits and expenses of the office shall be payable from funds budgeted to the Committee by the Arkansas Supreme Court. (Amended March 18, 2010.)

Section 6. Confidentiality; Records.

A. *Communications Confidential.* Subject to the exceptions listed in subsections B and C of this Section:

(1) All communications, complaints, formal complaints, testimony, and evidence filed with, given to or given before the Committee, or filed with or given to any of its employees and agents during the performance of their duties, that are based upon a complaint charging an attorney with violation of the Model Rules, shall be absolutely privileged and confidential; and

(2) All actions and activities arising from or in connection with an alleged violation of the Model Rules by an attorney licensed to practice law in this State are absolutely privileged and confidential.

(3) These provisions of privilege and confidentiality shall apply to complainants.

B. Exceptions.

(1) Except as expressly provided in these Procedures, proceedings under these Procedures are not subject to the Arkansas Rules of Civil Procedure regarding discovery.

(2) The records of public hearings conducted by the Committee pursuant to Section 11 of these Procedures are public information.

(3) In the case of disbarment, the Committee and the Office of Professional Conduct are authorized to release any information that either deems necessary for that purpose.

(4) The Committee is authorized to release information:

(a) For statistical data purposes;

(b) To a corresponding lawyer disciplinary authority or an authorized agency or body of a foreign jurisdiction engaged in the regulation of the practice of law;

(c) To the State Board of Law Examiners;

(d) To the Committee on the Unauthorized Practice of Law;

(e) To the Arkansas Client Security Fund Committee;

(f) To the Commission on Judicial Discipline and Disability;

(g) To any other committee, commission, agency or body within the State empowered to investigate, regulate or adjudicate matters incident to the legal profession when such information will assist in the performance of those duties;

(h) To any agency, body, or office of the federal government or this State charged with responsibility for investigation and evaluation of a lawyer's qualifications for appointment to a governmental position of trust and responsibility; or,

(i) Pursuant to the provisions of Section 9(A) and Section 15(B) of these Procedures.

(5) Any attorney against whom a formal complaint is pending shall have disclosure of all information in the possession of the Committee and the Office of Professional Conduct concerning that complaint including any record of prior complaints about that attorney. Procedures for discovery for formal complaints are set out in Section 8.

(6) The attorney about whom a complaint is made may waive, in writing, the confidentiality of the information.

(7) In all cases, the complainant shall be provided with a copy of the respondent attorney's affidavit of response and afforded a reasonable opportunity to reply.

C. Sanctions Made Public. When a public sanction becomes final under these Procedures, or when the Committee decides to initiate disbarment proceedings, a copy shall be forwarded to the Clerk and shall be maintained as a public record by the Clerk. Such information shall also be publicly disseminated, including release to the press and posting on the Arkansas Judiciary website.

CASE NOTES

Misconduct Complaint.

Formal complaints are absolutely privileged under this section, as are actions and activities arising from or in connection with an alleged violation of the Model Rules by an attorney licensed to practice law in Arkansas; however, the Executive Director and Committee on Professional Conduct do have certain

mandates they must follow once a complaint is initiated under the Arkansas Supreme Court's regulations. *Hogue v. Neal*, 340 Ark. 250, 12 S.W.3d 186 (2000).

Cited: *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998); *Todd v. Ligon*, 356 Ark. 187, 148 S.W.3d 229 (2004).

Section 7. Procedure.

A. General. A panel of the Committee shall adjudicate all formal complaints alleging violation of the Model Rules that may be brought to its attention in the form of an affidavit, or in respect of which any member of the Committee may have information, and shall give the attorney involved an opportunity to explain or refute the charge.

B. Standard of Proof. Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to or from inactive status shall be established by a preponderance of the evidence.

C. Burden of Proof. The burden of proof in proceedings seeking discipline or involuntary transfer to inactive status is on the Executive Director. The burden of proof in proceedings seeking reinstatement or transfer from involuntary or voluntary inactive status is on the attorney seeking such action.

D. Limitations on Actions. The institution of disciplinary actions pursuant to these Procedures shall be exempt from all statutes of limitation.

E. *Evidence and Procedures.* Except as noted in these Procedures, the Arkansas Rules of Evidence and the Arkansas Rules of Civil Procedure shall not generally apply to discipline proceedings.

F. *Pleadings.* All pleadings filed before the Committee shall be captioned "Before the Supreme Court Committee on Professional Conduct" and be styled "In re _____" to reflect the name of the respondent attorney.

G. *Prior Sanctions.* Information concerning prior discipline of the respondent attorney shall not be divulged to the Committee members hearing or reviewing a complaint until after a finding of misconduct has been made unless said information is relevant for purposes of impeachment, or probative of issues pending in the present matter, including, without limitation, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. [See Ark. R. Evid. 404(b).] If a panel is considering a matter by ballot-vote procedure, information concerning prior discipline of the respondent attorney, which is not subject to disclosure as set out above, shall be provided to the panel members in a sealed envelope accompanying the ballot, and shall not be unsealed and reviewed by the voting panel member until and unless the panel member shall mark the ballot finding a violation of a Model Rule.

H. *Ex Parte Communication.*

(1) Members of the Committee shall not communicate ex parte with the Executive Director or the staff of the Office of Professional Conduct, or the respondent attorney or his or her counsel regarding a pending or impending investigation or disciplinary matter except as explicitly provided for by law or these Procedures, or for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits.

(2) A violation of this rule may be cause for removal of any member from the panel before which a matter is pending.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Miscellaneous, 10 U. Ark. Little Rock L.J. 223.

CASE NOTES

ANALYSIS

Allegations of misconduct.

Circuit court.

Complaint.

Duties of director.

Findings of fact.

Hearing.

Jurisdiction.

Misconduct complaint.

Retroactivity.

Allegations of Misconduct.

Although disbarment proceedings are heard de novo on appeal, it would have been inappropriate for the Supreme Court to render judgment where the appeal was from a motion to dismiss; the matter had to be remanded to the circuit court. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994).

A prior version of this section provides a

right of appeal for an attorney who has been disbarred or suspended, but these Procedures do not expressly provide a right of appeal for a client filing a claim against the Client Security Fund; likewise, the rules governing the Client Security Fund Committee do not provide a right of appeal for a claimant seeking reimbursement from the Fund. Even so, a right of appeal does exist. *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994).

The Director and the Committee have mandatory duties that they must initiate. *Hogue v. Neal*, 340 Ark. 250, 12 S.W.3d 186 (2000).

Circuit Court.

Former Section 6 [now see Section 15] declares what type of action the Committee must file, and does not limit the type of action the court may impose, thus, where the Circuit Court finds that the attorney has violated the

Model Rules, former Section 5K [now see this section] applies. *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998).

Complaint.

There is no requirement in the Procedures of the Court Regulating Professional Conduct of Attorneys at Law that a complaint be filed by a court. *Potter v. Magee*, 61 Ark. App. 112, 964 S.W.2d 412 (1998).

Under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 13, the amendment of disbarment petitions was governed by Ark. R. Civ. P. 15(a), and the denial of the attorney's motions to strike amended pleadings was properly denied. *Ligon v. Walker*, 2009 Ark. 136, 297 S.W.3d 1 (2009).

Duties of Director.

The Executive Director has the duty to receive all complaints, determine whether or not the complaint is supported with sufficient evidence, and if so, the Director must process a formal complaint, direct it to the attorney for response, and assign the case a docket control number. *Hogue v. Neal*, 340 Ark. 250, 12 S.W.3d 186 (2000).

Findings of Fact.

A prior version of this section did not require the committee to make findings of fact. *Finch v. Neal*, 316 Ark. 530, 873 S.W.2d 519 (1994).

Although the committee is not bound by rules of the court and is not required to strictly adhere to the rules of evidence or the rules of procedure during a hearing conducted pursuant to a prior version of this section, it would have been appropriate and most helpful for the committee to have made findings, similar to those required by ARCP 52, as to attorney's conduct which was prejudicial to the administration of justice in violation of Model Prof. Cond. Rule 8.4(d); by doing so, the attorney would have understood the committee's actions and the Supreme Court would have been in a better position to evaluate the committee's findings in its de novo review. *Finch v. Neal*, 316 Ark. 530, 873 S.W.2d 519 (1994).

Section 8. Discovery.

A. *Scope.* Within ten days following the filing with the Office of Professional Conduct of a request for a hearing by a respondent attorney after a ballot vote pursuant to Section 10(D) (3), the Executive Director and the respondent attorney shall exchange the names and addresses of all persons having knowledge of relevant facts. Within sixty (60) days following the filing of the request, the Executive Director and the respondent attorney may take depositions in accordance with Arkansas Rule of Civil Procedure 30 and shall comply with reasonable requests for (i) non-privileged infor-

Hearing.

Upon actual receipt of a notice of suspension of his license, attorney was afforded a remedy under the Prof. Cond. Rules — an absolute right to a de novo hearing before the Committee; where he failed to exhaust his remedies by neglecting to exercise his right, he has waived his right to appeal to the Arkansas Supreme Court. *McCullough v. Neal*, 314 Ark. 372, 862 S.W.2d 279 (1993).

The Rules of Civil Procedure on summary judgment apply once the Committee files a disbarment action in the circuit court; if summary judgment is appropriate, a prior version of this section does not require the trial court to hold a full trial. *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998).

Jurisdiction.

The Arkansas Supreme Court derives its power through U.S. Const. Amend. 28 to establish and maintain, through its committee on professional conduct, jurisdiction over a lawyer's person by virtue of the issuance of his license to practice law. *McCullough v. Neal*, 314 Ark. 372, 862 S.W.2d 279 (1993).

Misconduct Complaint.

Procedures mandate that the Committee on Professional Conduct accept and treat as a formal complaint any writing signed by a judge of a court of record in Arkansas, and a judge's complaint requires little or no action by the Executive Director or Committee before the Committee must begin its procedures in notifying the attorney of the charges against him or her, so the attorney can explain or refute them. *Hogue v. Neal*, 340 Ark. 250, 12 S.W.3d 186 (2000).

Retroactivity.

A prior version of this section did not authorize a trial court to run a suspension retroactively. *Neal v. Matthews*, 342 Ark. 566, 30 S.W.3d 92 (2000).

Cited: *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996); *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999); *Todd v. Ligon*, 356 Ark. 187, 148 S.W.3d 229 (2004).

mation and evidence relevant to the charges or the attorney, and (ii) other material upon good cause shown to the chair of the panel before which the matter was pending.

B. *Resolution of Disputes.* Disputes concerning discovery shall be determined by the chair of the panel to which the matter was assigned. All discovery orders by the chair are interlocutory and may not be appealed prior to the entry of the final order.

C. *Rules of Civil Procedure Not Applicable.* Proceedings under these rules are not subject to the Arkansas Rules of Civil Procedure regarding discovery except those relating to depositions and subpoenas.

CASE NOTES

Interim Suspension.

Upon presentation of a judgment of conviction, there is no right to a public hearing; rather, interim suspension may be imposed

upon presentation of the file-marked copy of the judgment. *Wood v. Supreme Court Comm. on Prof'l Conduct*, 343 Ark. 696, 38 S.W.3d 310 (2001).

Section 9. Service of complaint; Response; Failure to respond; Reconsideration.

Upon the filing of a formal complaint, the Executive Director shall:

A. Service of Complaint.

(1) Furnish to the attorney complained against a copy of the formal complaint and advise the attorney that he or she may file a written response in affidavit form with any supporting evidence desired. The attorney's mailing address on record with the Clerk shall constitute the address for service by mail. Attorneys shall be responsible for informing the Clerk in writing and within a reasonable time of any change of such address. Certified mailing of the formal complaint to said address shall be deemed a waiver of confidentiality for purposes of Section 9(A)(2)(c).

(2) Service may be effected on a respondent attorney by:

(a) Mailing a copy of the formal complaint to attorney's address of record by certified, restricted delivery, return receipt mail; or,

(b) Personal service as provided by the Arkansas Rules of Civil Procedure or by an Investigator with the Office of Professional Conduct; or,

(c) When reasonable attempts to accomplish service by Section 9(A)(2)(a) or Section 9(A)(2)(b) have been unsuccessful, then a warning order, in such form as prescribed by the Committee, shall be published weekly for two consecutive weeks in a newspaper of general circulation within this State or within the locale of the attorney's address of record. In addition, a copy of the formal complaint and warning order shall be sent to the respondent attorney's address of record by regular mail.

(3) An attorney's failure to provide an accurate, current mailing address to the Clerk as required by Section 9(A)(1), or the failure or refusal to receipt certified mailing of a formal complaint, shall be deemed a waiver of confidentiality for the purposes of the issuance of a warning order.

(4) Unless good cause is shown for an attorney's non-receipt of a certified mailing of a formal complaint, the attorney shall be liable for the actual costs and expenses for service or the attempted service of a formal complaint, to include all expenses associated with the effectuation of service. Such sums will be due and payable to the Committee before any response to a formal complaint will be accepted or considered by the Committee.

(5) After service has been effected by any of the aforementioned means, subsequent mailings by the Committee to the respondent attorney may be by regular mail to the attorney's address of record, address at which service was accomplished, or to such address as may have been furnished by the attorney, as the appropriate circumstance may dictate, except that notices of hearings and letters of caution, reprimand, suspension or initiation of disbarment proceedings shall also be sent by certified, return receipt mail.

(6) Service on a non-resident attorney may be accomplished pursuant to Section 9(A)(2)(a), (b) or (c), or in any manner prescribed by the law of the jurisdiction to which the service is directed.

(B) Time and Manner of Response.

(1) Upon service of a formal complaint, pursuant to Section 9(A)(2)(a) or Section 9(A)(2)(b), or the date of the first publication, pursuant to Section 9(A)(2)(c), the attorney shall have twenty (20) days in which to file a written response consisting of an original and eight (8) copies with the Executive Director, except when service is upon a non-resident of this State, in which event the attorney shall have thirty (30) days within which to file a response. In the event that the Executive Director has not received a response within twenty (20) days or within thirty (30) days, as the appropriate case may be, following the date of service, and an extension of time has not been granted, the Executive Director shall proceed to issue ballots as provided in Section 10.

(2) At the request of an attorney, the Executive Director is authorized to grant an extension of reasonable length for the filing of a response. Subsequent requests for extensions must be in written form and will be ruled on by the Chairperson of the Committee, or the chair of the panel to which the matter has been assigned.

(3) The Executive Director shall provide a copy of the attorney's response to the complainant within ten (10) days of receiving it and advise that the complainant has seven (7) days in which to rebut or refute any allegations or information contained in the attorney's response. The Executive Director may include any rebuttal made by the complainant as a part of the material submitted to the Committee for decision and any such rebuttal shall be provided to the respondent attorney for informational purposes only, with no response required. If rebuttal to be submitted to the Committee contains allegations of violation of the Model Rules not previously alleged, it shall be in the form of a supplemental affidavit of complaint and the respondent attorney shall be provided a copy and permitted surrebuttal in the manner prescribed in subsection B(1) of this Section, except the time for doing so shall be ten (10) days.

(4) The calculation of the time limitations specified in Section 9(B) shall commence on the day following service upon the respondent. If the due date of a response or surrebuttal falls on a Saturday, Sunday, or legal holiday, the due date will be extended to the next regular business day.

(C) Failure to Respond; Reconsideration.

(1) An attorney's failure to provide, in the prescribed time and manner, a written response to a formal complaint served in compliance with Section 9(A)(2) shall constitute separate and distinct grounds for the imposition of sanctions notwithstanding the merits of the underlying, substantive allegations of the complaint; or,

(2) May be considered for enhancement of sanctions imposed upon a finding of violation of the Model Rules.

(3) The separate imposition or the enhancement of sanctions for failure to respond may be accomplished by the panel's notation of such failure in the appropriate sanction order and shall not require any separate or additional notice to the respondent attorney.

(4) Failure to respond to a formal complaint shall constitute an admission of the factual allegations of the complaint and shall extinguish a respondent's right to a public hearing.

(a) Provided, however, that a respondent attorney, within the time specified in Section 10(D)(3), may file with the Executive Director an original and eight (8) copies of a petition for reconsideration, stating, on oath, compelling and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to respond. Otherwise, the panel's decision shall be final and will be filed of record with the Clerk.

(b) Upon the filing of a petition for reconsideration, the Executive Director shall provide each member of the panel a copy of the petition for vote by written ballot consistent with provisions of Section 10.

(c) If a majority of the panel, upon a finding of clear and convincing evidence, votes to grant the petition for reconsideration, the panel may:

(i) Permit the attorney to submit a belated affidavit of response to the substantive allegations of the formal complaint and the matter shall proceed as though the response had been made timely; and/or

(ii) Set aside any sanction imposed solely on the basis of the attorney's failure to respond.

(d) If the petition for reconsideration is denied, the panel's original decision and imposition of sanctions become final and will be filed of record with the Clerk. Appeal from the Committee's denial of reconsideration and the imposition of sanctions may be taken in the time and manner prescribed by the applicable provisions of Section 12. Provided, however, that such appeal cannot attack the substantive allegations of the complaint and shall be limited to the panel's denial of reconsideration.

CASE NOTES

ANALYSIS

Compliance.

Sanctions reversed.

Untimely response.

Compliance.

Finding that the attorney violated the Arkansas Rules of Professional Conduct was appropriate because subdivision (A)(2)(a) of this rule did not require that the Arkansas Supreme Court Committee on Professional Conduct provide a completed return receipt to comply with the service requirements. When the complaint was sent by certified mail, restricted delivery, return receipt mail, to the address that an attorney provided, the Committee was in compliance; it was the attorney's responsibility of keeping the Clerk's office informed of his current address. *Jenkins v. Ligon*, 2010 Ark. 24, — S.W.3d —, 2010 Ark. LEXIS 32 (Jan. 21, 2010).

Sanctions Reversed.

Additional suspension of six months and a fine of \$2500 as a sanction for an attorney's failure to respond to the committee on profes-

sional conduct's complaint was reversed where there was no reason for the attorney to have filed a second document admitting that the untimely filing of the notice of appeal was his fault when the committee had the attorney's motion for belated appeal that he had filed with the Supreme Court of Arkansas; however, the court upheld the original suspension for three months and the award of \$50 in costs. *Gillaspie v. Ligon*, 357 Ark. 50, 160 S.W.3d 332 (2004).

Untimely Response.

Order suspending an attorney from the practice of law for 12 months was upheld because the attorney failed to timely respond to the formal complaint, as required by subdivision (B)(1) of this rule; the Arkansas Supreme Court Committee on Professional Conduct acted within its authority in treating the attorney's failure to respond as an admission of the allegations in the complaint. *Donovan v. Supreme Court Comm. on Prof'l Conduct*, 375 Ark. 350, 290 S.W.3d 599 (2009).

Section 10. Vote by ballot.

A. At such time as the Executive Director has received from the attorney a written response or the attorney has failed to respond within the period provided in Section (9)(B), the Executive Director shall cause to be prepared seven copies of the complainant's affidavit, the response, rebuttal, exhibits, and a separate sealed envelope containing information concerning any prior discipline of the respondent attorney and shall send a copy thereof to each member of the seven-member panel to which the matter has been assigned. The members of the panel and its chair shall be selected by the Chairperson of the Committee. The Executive Director shall not take part in the deliberations of the panel. Each member shall vote by written ballot.

B. Each ballot shall contain appropriate spaces for:

- (1) The name and signature of the panel member;
- (2) The date;
- (3) The member's vote on the action to be taken on the formal complaint; and,
- (4) A place for the members to state which Section(s) of Model Rules, if any, are found to be violated.

C. If a majority of the panel returns written ballots expressing a desire to cause a respondent attorney, complainant, or other person to appear for the purposes of eliciting testimony, production of records and documents, provision of additional information or evidence, or for any other relevant purposes involved with a matter pending before the panel, a hearing will be scheduled and summonses or subpoenas may issue as required. Such evidentiary hearing shall not be public and no adjudicative decision will be pronounced or rendered at that time. The Committee, upon written ballot or voice vote, subsequently shall notify the respondent attorney of the decision and notify the complainant if no disciplinary action was warranted. Otherwise, the provisions of Section 10(D)(3) shall apply. Any recorded testimony, records, documents, exhibits or other evidence adduced at an evidentiary hearing may be received and made part of the record at a subsequent public hearing.

D. Results of Ballot Vote.

(1) In the event a majority of the panel votes to take no disciplinary action against a respondent attorney, the panel shall so advise the Office of Professional Conduct, which shall notify the complainant and the respondent attorney. The Office of Professional Conduct shall file a monthly report of such cases, by number only, as a public record in the office of the Clerk.

(2) If the vote is to warn, an appropriate letter shall be sent to the respondent and the complainant. The Office of Professional Conduct shall file a monthly report of such cases, by number only, as a public record in the office of the Clerk.

(3) If a majority of the panel returns written ballots to caution, reprimand, or suspend the attorney, the attorney shall be notified of the findings and decision of the panel, and be advised that he or she has a right, upon written request filed with the Office of Professional Conduct within twenty (20) days of service as defined by Section 9(A)(2), to a hearing before another seven-member panel of the Committee, none of which were members of the original panel, as provided in Section 11. The attorney shall also be advised that in the absence of a request for a hearing, such findings and order of the Committee will be entered in the files of the Committee and will be filed as a public record in the office of the Clerk.

(4) If a majority of the panel votes by paper ballot to initiate disbarment proceedings, the Committee shall proceed as set out in Section 13 and there shall be no public hearing before the Committee pursuant to Section 11. If the panel finds that a lawyer has committed acts against a client which constitute theft of property under Ark. Code Ann. § 5-36-103 (or its replacement), regardless of whether the attorney has been convicted, disbarment proceedings must be instituted.

(5) If any findings of fact, conclusions of law, or other recommendations are necessary at the conclusion of the ballot process, they shall be prepared by the Office of Professional Conduct with the advice and consent of the panel.

(6) The panel may refer matters involving lesser misconduct to alternatives-to-discipline programs as explained in Section 5(C)(2).

CASE NOTES

Warning.

Ark. Sup. Ct. Prof. Conduct P. § 17(E)(6) did not provide that a warning may only be imposed before an Arkansas Committee on Professional Conduct vote, the committee was authorized to issue a warning before preparation of a complaint, and subsection (D) of this section provided that the committee may im-

pose a warning after a ballot vote; taken together, the two sections authorized the committee to impose a warning at any time prior to a public hearing where the requirements of the sections were met. *Lewellen v. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003).

Section 11. Public hearing.

If a hearing is requested after a ballot vote:

A. A panel will be so notified, and the written ballots if any, will be destroyed. The prior findings and decision shall be for naught and a panel will hear the complaint de novo under the rules for public hearings. The public hearing shall be heard before a seven-member panel of the Committee, the members of which will be selected by the Chairperson of the Committee, none of whom shall have been members of the original ballot-vote panel.

B. The Executive Director shall set a date for the hearing and shall notify the respondent attorney and the complainant of the hearing date. Once a hearing is set, the granting of any request for a continuance shall be at the discretion of the chair of the panel. The chair of the panel may require a prehearing conference.

C. At the end of the hearing, the panel shall hold an executive session to deliberate upon any disciplinary action to be taken. The findings and decision of the panel shall be announced immediately. The votes of the individual members shall be announced if the decision is not unanimous.

D. If a majority of the panel votes to caution, reprimand, or suspend an attorney, the Office of Professional Conduct shall be so advised, and shall notify the complainant of the specific action taken against the attorney. The Office of Professional Conduct will prepare, with the advice and consent of the panel, the Findings and Order, and a copy shall be filed as a public record in the office of the Clerk.

E. If a majority of the panel votes to disbar, the Executive Director, shall file an action for disbarment as provided in Section 13. Alternatively, if circumstances require and with the Supreme Court's approval, the panel may retain independent counsel to prosecute the disbarment proceeding. If the panel finds that a lawyer has committed acts against a client which

constitute theft of property under Ark. Code Ann. § 5-36-103 (or its replacement), regardless of whether the attorney has been convicted, disbarment proceedings must be initiated.

F. The Committee may refer matters involving lesser misconduct to alternatives- to-discipline programs as explained in Section 5(C)(2).

G. *Doctor-Patient Privilege Waived*. Raising the defense of mental or physical disability by one who is the subject of a disciplinary proceeding shall constitute a waiver of the doctor-patient privilege.

G. *Immunity for Disciplinary Proceedings*. Except for perjury and false swearing, complainants, respondents and witnesses are absolutely immune from suit or action for all communications with the Committee and all statements made within the disciplinary proceeding.

CASE NOTES

Findings and Conclusions.

It was the duty of the Office of Professional Conduct to prepare a draft order containing the findings of fact and conclusions of law made by the Supreme Court Committee on Professional Conduct in an attorney disci-

pline case, and the Chairman of the Committee acted within his authority in signing the order on behalf of the Committee. *Cortinez v. Ark. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003).

Section 12. Appeal.

A. A respondent attorney or the Executive Director aggrieved by an action of a panel taken at a public hearing, may appeal to the Arkansas Supreme Court by filing a Notice of Appeal with the Office of Professional Conduct within thirty (30) days after the filing of the panel's written action with the Clerk. In appeals directly from the panel, the action shall proceed as an action between the Executive Director and the respondent. The panel may stay the effective date of any action pending appeal to the Arkansas Supreme Court. There shall be no appeal by the respondent attorney of a panel's decision to file an action for disbarment pursuant to Section 13.

B. Appeals from any action by a panel after hearing shall be heard de novo on the record and the Arkansas Supreme Court shall pronounce such judgment as in its opinion should have been pronounced below.

C. Notice of appeal and perfection of appeal shall be in accordance with the Rules of Appellate Procedure — Civil and Rules of the Arkansas Supreme Court governing appeals in civil matters. If no appeal is perfected within the time allowed and in the manner provided, the action of the panel shall be final and binding on all parties.

CASE NOTES

ANALYSIS

Applicability.

Disbarment warranted.

Public hearing required.

Applicability.

Attorney's appeal was dismissed where Ark. Sup. Ct. Prof. Conduct P. 14 was completely silent on the matter of an appeal to the supreme court; as there was no public hearing, the attorney did not have the right to appeal under this rule. *Stanley v. Ligon*, 374

Ark. 6, 285 S.W.3d 649 (2008).

Disbarment Warranted.

Where an attorney, after his license was temporarily suspended due to his felony conviction for DWI, held himself out as a landlord's attorney, advised the landlord's tenant that the tenant had to vacate leased premises, and represented the landlord at a city council meeting concerning a condemnation matter, the attorney was disbarred pursuant to Ark. Sup. Ct. Prof. Conduct P. § 13(D) because the

special judge did not clearly err in concluding (1) that the DWI conviction constituted a serious crime under Ark. Sup. Ct. Prof. Conduct P. § 2(J); (2) that the attorney violated Ark. R. Prof. Conduct 8.4(b); and (3) that the attorney's DWI conviction and unauthorized practice of law in violation of § 16-22-501(a)(2) constituted serious misconduct under Ark. Sup. Ct. Prof. Conduct P. § 17(B). *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Public Hearing Required.

This rule allows appeals to be taken from any action by a panel taken at a public

hearing; thus, where the attorney was not appealing an action by a panel taken at a public hearing, but was challenging the order denying his motion to dismiss a complaint against him, it was not a final order, as required by Ark. R. App. P. Civ. 2(a)(1), and the appellate court did not have jurisdiction to hear the appeal. *Burnett v. Supreme Court Comm. on Prof'l Conduct*, 359 Ark. 279, 197 S.W.3d 458 (2004).

Cited: *Comm. on Prof'l Conduct v. Revels*, 360 Ark. 69, 199 S.W.3d 630 (2004); *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011).

Section 13. Disbarment proceedings.

(A) An action for disbarment shall be filed as an original action with the Clerk of the Supreme Court. Upon such filing, the Arkansas Supreme Court, pursuant to Amendment 28 of the Arkansas Constitution, shall assign a special judge to preside over the disbarment proceedings. The Clerk shall arrange for a courtroom or other suitable facility in Pulaski County in which the proceedings shall be heard. The special judge may hear preliminary and posttrial matters and take other such actions outside of Pulaski County to the same extent that the law permits judges sitting by assignment or on exchange to do. With the consent of all the parties, the judge may conduct the proceedings outside of Pulaski County. All allegations of violation(s) of the Model Rules by the attorney, notwithstanding the situs of the alleged conduct, shall be heard in this proceeding. In disbarment suits, the action shall proceed as an action between the Executive Director and the respondent. Proceedings shall be held in compliance with the Arkansas Rules of Civil Procedure and the Arkansas Rules of Evidence, and trial shall be had without a jury.

(B) The judge shall first hear all evidence relevant to the alleged misconduct and shall then make a determination as to whether the allegations have been proven. Upon a finding of misconduct, the judge shall then hear all evidence relevant to an appropriate sanction to be imposed, including evidence related to the factors listed in Section 19 and the aggravating and mitigating factors set out in the American Bar Association's Model Standards for Imposing Lawyer Sanctions, §§ 9.22 and 9.32 (1992). See *Wilson v. Neal*, 332 Ark. 148, 964 S.W. 2d 199 (1998).

(C) The judge shall make findings of fact and conclusions of law with respect to the alleged misconduct of the respondent attorney and the imposition of sanctions, including the factors discussed in subsection 13(B). Before filing the findings and conclusions, the judge may submit a draft thereof to counsel for all parties for the purpose of receiving their objections and suggestions. The judge shall make a recommendation as to the appropriate sanction from those set out in Section 17(D).

(D) The findings of fact, conclusions of law, and recommendation of an appropriate sanction shall be filed with the Clerk of the Supreme Court along with a transcript and the record of the proceedings. Upon the filing, the parties shall file briefs as in other cases. The findings of fact shall be accepted by the Supreme Court unless clearly erroneous. The Supreme Court shall impose the appropriate sanction, if any, as the evidence may warrant. In imposing the sanction of suspension, the attorney may be

suspended for a period not exceeding five (5) years. There is no appeal from the decision of the Supreme Court except as may be available under federal law.

CASE NOTES

ANALYSIS

Amendment of pleadings.
Disbarment not available.

Amendment of Pleadings.

Under this rule, the amendment of disbarment petitions was governed by Ark. R. Civ. P. 15(a), and the denial of the attorney's motions to strike amended pleadings was properly denied. *Ligon v. Walker*, 2009 Ark. 136, 297 S.W.3d 1 (2009).

Supreme court does not have the inherent authority to order an attorney disbarred because the supreme court's authority over the discipline of attorneys does not mean that it will ignore the specific procedures set forth for instituting a disbarment proceeding, and while the supreme court does conduct a de novo review of the record before it, the supreme court will not go so far to order disbarment in the absence of the Executive Director

of the Supreme Court Committee on Professional Conduct initiating a disbarment proceeding. *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011).

Disbarment Not Available.

Sanction of disbarment was not available in an attorney's case involving a violation of Ark. R. Prof'l Conduct 8.4(b) for illegally possessing a controlled substance, methamphetamine, a Class C felony, because there had been no compliance with this rule; no action for disbarment was instituted with the supreme court clerk, and special judge had not been appointed to hear evidence and make findings of fact, conclusions of law, or any recommendation for the supreme court to review. *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011).

Section 14. Reciprocal disbarment, suspension, or disability inactive status.

A. Executive Director's Duty to Obtain Order of Disbarment, Suspension, or Transfer to Disability Inactive Status. Within fifteen (15) days after any person admitted to practice in Arkansas is disbarred, suspended, or transferred to disability inactive status by a state or federal court or a corresponding disciplinary authority of another jurisdiction, the attorney shall inform the Executive Director of the disbarment, suspension, or transfer. Upon notification from any source that an attorney licensed to practice in Arkansas has been disbarred, suspended, or transferred to disability inactive status by another state or federal court or a corresponding disciplinary authority of another jurisdiction, the Executive Director shall obtain a certified copy of the order imposing such discipline and file it with the Committee on Professional Conduct.

B. Notice Served upon Respondent. Upon receipt of a certified copy of an order imposing a disbarment, suspension, or transfer, the Executive Director shall serve on the attorney, as provided in Section 9, a copy of the order and notice that the attorney has twenty (20) days from the day of service to file with the Executive Director any claim by the attorney predicated upon the grounds set forth in Paragraph F, that the imposition of the identical sanction would be unwarranted and the reasons for that claim.

C. Effect of Stay in Other Jurisdiction. In the event the disbarment, suspension, or transfer to disability inactive status imposed in the other jurisdiction has been stayed there, any reciprocal sanction imposed in this jurisdiction shall be deferred until the stay expires.

D. No Claim Filed. If no claim is filed within twenty (20) days, the Executive Director shall so inform the Committee, which shall proceed to

determine the matter by ballot vote consistent with the requirements of Section 10 of these Procedures, to the extent applicable.

E. *Claim Filed.* If a claim is filed within twenty (20) days, the Executive Director may file and serve a response to the claim within fifteen (15) days after the claim is filed. Within fifteen (15) days after service of any such response, the attorney who filed the claim may file a reply. The claim shall be determined by ballot vote consistent with the requirements of Section 10 of these Procedures, to the extent applicable.

F. *Discipline to Be Imposed.* Upon a ballot vote, a Panel of the Committee shall impose the identical disbarment, suspension, or transfer to disability inactive status unless, the panel finds that:

(1) The procedure before the other state or federal court or corresponding disciplinary authority was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(3) The disbarment, suspension, or transfer imposed would result in grave injustice or be offensive to the public policy of Arkansas; or

(4) The reason for the original transfer to disability inactive status no longer exists.

If the Committee determines that any of those elements exists, the Committee shall enter such other order as it deems appropriate. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate.

G. *Conclusiveness of Adjudication Before Another State or Federal Court or Corresponding Disciplinary Authority.* In all other aspects, a final adjudication before another state or federal court or corresponding disciplinary authority determining that a lawyer is guilty of misconduct or should be transferred to disability inactive status shall establish conclusively the misconduct or the disability for purposes of a disciplinary or disability proceeding in this jurisdiction.

H. *Appeal.* A respondent attorney or the Executive Director aggrieved by the action of a Committee Panel on a reciprocal discipline or disability matter may appeal to the Arkansas Supreme Court under the provisions of Section 12 (Appeal) of these Procedures. Neither the attorney nor the Executive Director may request or obtain a public hearing before another Committee Panel on a reciprocal disbarment, suspension, or transfer to disability inactive status. (Amended January 14, 2010.)

RESEARCH REFERENCES

ALR. Reciprocal Discipline of Attorneys — Criminal Conduct. 43 ALR 6th 163.

Reciprocal Discipline of Attorneys — Non-criminal Misconduct Towards Clients Not Involving Client Funds. 44 ALR 6th 75.

Reciprocal Discipline of Attorneys — Commingling or Other Mishandling of Client Funds. 45 ALR 6th 175.

CASE NOTES

ANALYSIS

Applicability.
Writ of mandamus.

Applicability.

Attorney's appeal was dismissed where this rule was completely silent on the matter of an appeal to the supreme court; as there was no public hearing, the attorney did not have the right to appeal under Ark. Sup. Ct. Prof. Conduct P. 12. *Stanley v. Ligon*, 374 Ark. 6, 285 S.W.3d 649 (2008).

Writ of Mandamus.

Attorney demonstrated that he was entitled to the relief he sought in his petition for

writ of mandamus where he was entitled to be heard on the issue of whether this rule was applicable to his situation; the Arkansas Supreme Court Committee clearly exceeded its authority as this rule was not applicable as the attorney was never disbarred or suspended from the practice of law in any other state as expressly required in subsection A. of this rule. *Stanley v. Ligon*, 374 Ark. 6, 285 S.W.3d 649 (2008).

Section 15. Criminal activity.

A. Reporting Determinations of Guilt. All prosecuting attorneys and judges participating in or presiding over a proceeding in which an attorney pleaded guilty to, entered a nolo contendere plea, or has been found guilty of a Serious Crime in any jurisdiction shall have the duty to report such conviction or plea to the Executive Director.

B. Notification of Possible Criminal Activity. When, in connection with an investigation or a hearing, either the Office of Professional Conduct or the Committee is presented with any substantial evidence of criminal conduct by any party which would constitute a Serious Crime in any jurisdiction, the Office of Professional Conduct on its own initiative or at the direction of the Committee shall notify the appropriate prosecutorial authority.

C. Procedures for Disbarment.

(1) When a complaint against an attorney is based on a conviction in any jurisdiction of a Serious Crime, or a crime which also violates Rule 8.4(b) of the Model Rules of Professional Conduct, the Committee shall institute disbarment proceedings.

(2) Actions for disbarment based on the conviction of a crime shall proceed in accordance with the procedures in Section 13 of these Procedures.

(3) A certified copy of the judgment of conviction shall be conclusive evidence of the attorney's guilt.

(4) The attorney may not offer evidence inconsistent with the essential elements of the crime for which he or she was convicted.

RESEARCH REFERENCES

ALR. Disciplining Attorney for Abuse or Misuse of Computer Technology, Including

Internet and E-Mail Activities. 46 ALR 6th 365.

CASE NOTES

ANALYSIS

In general.
Construction.
Applicability.
Accrual of action.
Evidence.
Issues considered.

In General.

Former section 6B (now see this section) requires the Committee on Professional Conduct to institute a disbarment action when the complaint against an attorney is based on a conviction of a felony or a criminal act that, under the terms of Model Prof. Cond. Rule

8.4(b), reflects adversely on the attorney's "honesty, trustworthiness or fitness as a lawyer in other respects." *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994).

Construction.

Former section 6B (now see this section) declares what type of action the Committee must file but does not limit the sanctions the court may impose; where the Circuit Court finds that the attorney has violated the Model Rules, Section 5 K.(2) applies. *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998).

Applicability.

The trial court erred in finding that the effective rules were those in force at the time of the attorney's misconduct rather than at the time of his guilty plea eight years later. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994).

Accrual of Action.

The cause of action for professional misconduct discipline did not accrue until the date

on which the attorney entered his guilty plea to misdemeanor charges. *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994).

Evidence.

Upon receiving a certified copy of an attorney's judgment of conviction for felony DWI, the Arkansas Supreme Court Committee on Professional Conduct was authorized under Ark. Sup. Ct. Prof. Conduct P. § 16(A)(2) and 17(E)(3)(b) to temporarily suspend the attorney's license to practice law because (1) a felony conviction constituted a serious crime under Ark. Sup. Ct. Prof. Conduct P. § 2(J); and (2) pursuant to subdivision (C)(3) of this section, the copy of the judgment was conclusive evidence of the attorney's guilt. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Issues Considered.

Once an attorney is convicted of a crime in federal court, he is precluded from relitigating any of the elements of the crimes during any resulting disbarment proceeding. *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998).

Section 16. Interim suspension procedure.

A. An action for the interim suspension of a lawyer is initiated, adjudicated and imposed in the following manner:

(1) Pursuant to Section 17(E)(3)(a), an interim suspension may be imposed immediately upon a panel's decision to institute disbarment action on any formal complaint pending before it;

(2) Pursuant to Section 17(E)(3)(b), an interim suspension may be imposed upon presentation to a panel of the Committee of satisfactory proof that the attorney has pleaded guilty to, entered a nolo contendere plea, or has been found guilty of a Serious Crime in any jurisdiction;

(3) Pursuant to Section 17(E)(3)(c), a panel of the Committee may impose an interim suspension upon presentation of a verified petition by the Executive Director containing sufficient evidence to demonstrate that the attorney poses a substantial threat of serious harm to the public or to the lawyer's clients.

B. The attorney shall be given immediate notice of interim suspension consistent with the provisions of Section 9(A). Within seven (7) days of notice of the imposition of interim suspension, the attorney may submit to the Executive Director an affidavit in rebuttal of the evidence before the panel of the Committee and a request for the dissolution or modification of the interim suspension. An original and eight (8) copies of the rebuttal and request will be submitted to the Executive Director which shall be forthwith disseminated by mail or facsimile transmission to the panel of the Committee for its reconsideration and expeditious action. Upon receipt of the panel's decision, the Executive Director shall promptly notify the attorney pursuant to Section 9(A)(2).

C. An attorney suspended pursuant to Section 17(E)(3) shall comply with the requirements of Section 21. The imposition of an interim suspension does not abate any pending disciplinary actions against the attorney.

D. An interim suspension imposed pursuant to Section 17E(3)(c) shall be dissolved upon the following conditions:

(1) The alleged misconduct did not result in a decision to initiate disbarment or in action by a panel of the Committee pursuant to Sections 9(A)(1), 9(B), and 10(D)(3); and

(2) Ninety (90) days have elapsed from the denial of a request to dissolve or modify the suspension; and,

(3) The attorney complied with the requirements of Section 21.

CASE NOTES

Serious Crime.

Upon receiving a certified copy of an attorney's judgment of conviction for felony DWI, the Arkansas Supreme Court Committee on Professional Conduct was authorized under subdivision (A)(2) of this section and Ark. Sup. Ct. Prof. Conduct P. § 17(E)(3)(b) to temporarily suspend the attorney's license to

practice law because (1) a felony conviction constituted a serious crime under Ark. Sup. Ct. Prof. Conduct P. § 2(J); and (2) pursuant to Ark. Sup. Ct. Prof. Conduct P. § 15(C)(3), the copy of the judgment was conclusive evidence of the attorney's guilt. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Section 17. Sanctions.

A. Grounds for Discipline. It shall be grounds for discipline for a lawyer to:

(1) Violate or attempt to violate the Model Rules of Professional Conduct, or any other rules of this jurisdiction regarding professional conduct of lawyers; or

(2) Engage in conduct violating applicable rules of professional conduct of another jurisdiction in which the attorney is licensed or practices.

B. Serious Misconduct. Serious misconduct is conduct in violation of the Model Rules that would warrant a sanction terminating or restricting the lawyer's license to practice law. Conduct will be considered serious misconduct if any of the following considerations apply:

(1) The misconduct involves the misappropriation of funds;

(2) The misconduct results in or is likely to result in substantial prejudice to a client or other person;

(3) The misconduct involves dishonesty, deceit, fraud, or misrepresentation by the lawyer;

(4) The misconduct is part of a pattern of similar misconduct;

(5) The lawyer's prior record of public sanctions demonstrates a substantial disregard of the lawyer's professional duties and responsibilities; or

(6) The misconduct constitutes a "Serious Crime" as defined in these Procedures.

C. Lesser Misconduct. Lesser misconduct is conduct in violation of the Model Rules that would not warrant a sanction terminating or restricting the lawyer's license to practice law.

D. Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) **DISBARMENT:** The termination of the lawyer's privilege to practice law and removal of the lawyer's name from the list of licensed attorneys.

(2) **SUSPENSION:** A limitation for a fixed period of time on the lawyer's privilege to engage in the practice of law.

(3) **INTERIM SUSPENSION:** A temporary suspension for an indeterminate period of time of the lawyer's privilege to engage in the practice of law pending the final adjudication of a disciplinary matter.

(4) **REPRIMAND:** A severe public censure issued against the lawyer.

(5) **CAUTION:** A public warning issued against the lawyer.

(6) **WARNING:** A non-public caution issued against the lawyer.

(7) **PROBATION:** Written conditions imposed for a fixed period of time, and with the lawyer's consent, permitting the lawyer to engage in the practice of law under the supervision of another lawyer.

E. Imposition of Sanctions. When a panel of the Committee finds that an attorney has violated any provision of the Model Rules, the panel is authorized:

(1) To cause a complaint for disbarment to be prepared and filed against the lawyer in accordance with Section 13. Disbarment proceedings are appropriate when mandated by Section 15(C) of the Procedures or upon a finding of "serious misconduct" for which a lesser sanction would be inappropriate. A finding that a lawyer has committed acts against a client which constitute theft of property under Ark. Code Ann. § 5-36-103 (or its replacement), regardless of whether the attorney has been convicted, shall result in the automatic filing of disbarment proceedings. Actions for disbarment address the overall fitness of a lawyer to hold a license to practice law. The Committee's written notice to institute a disbarment proceeding need not state specific findings as to the misconduct or Model Rule violations.

(2) To suspend the lawyer's privilege to practice law for a fixed period of time not in excess of five (5) years. Suspension is appropriate when a panel of the Committee finds that the lawyer has engaged in "serious misconduct", and, consonant with the pertinent factors enunciated in Section 19, the nature and degree of such misconduct do not warrant disbarment.

(3) To temporarily suspend the lawyer's privilege to practice law pending final adjudication and disposition of a disciplinary matter. Interim suspension shall be appropriate in the following situations:

(a) Immediately on decision to initiate disbarment;

(b) Immediately upon proof that the attorney has been found guilty of a Serious Crime in any jurisdiction, notwithstanding pending post-conviction actions; and,

(c) When a panel of the Committee is in receipt of sufficient evidence demonstrating that the lawyer has engaged or is engaging in misconduct involving:

(i) Misappropriation of funds or property;

(ii) Abandonment of the practice of law; or,

(iii) Substantial threat of serious harm to the public or to the lawyer's clients.

(4) To issue the lawyer a letter of reprimand. A reprimand is appropriate when a panel of the Committee finds that a lawyer has engaged in "lesser misconduct" that, by application of the factors enunciated in Section 19, warrants a sanction more severe than a caution. Additionally, in certain very limited circumstances, a panel of the Committee may find that a reprimand is appropriate for conduct otherwise falling within the definition of "serious misconduct" when application of the aforementioned factors substantially demonstrates clear and compelling grounds for sanctions less severe than restriction of the privilege to practice law.

(5) To issue the lawyer a letter of caution. A caution is appropriate when a panel of the Committee finds that a lawyer has engaged in "lesser misconduct" and application of the aforementioned factors does not warrant a reprimand.

(6) To issue a letter of warning. Prior to the preparation of an affidavit of complaint, or subsequent to a lawyer's affidavit of response but before a

panel of the Committee has issued a formal letter of disposition in a pending matter, the Executive Director, with the written consent of the attorney and with the approval of and at the direction of the chair of a panel, is authorized to issue a non-public letter of warning against the lawyer. A warning is not appealable. Only in cases of "lesser misconduct" of a minor nature, when there is little or no injury to a client, the public, the legal system or the profession, and when there is little likelihood of repetition by the lawyer, should a warning be imposed. A warning is not a sanction available to a panel of the Committee when issuing a formal letter of disposition following public adjudication of the disciplinary matter.

(7) To impose probationary conditions. Prior to or subsequent to the filing of a formal complaint, a panel of the Committee may, with the written consent of the lawyer, place the lawyer on probation for a period not exceeding two (2) years. Probation shall be used only in cases where there is little likelihood that the lawyer will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation may be utilized concurrently with imposition of other sanctions not restricting the privilege to practice law or may follow a period of suspension. The probationary conditions shall be in writing and acknowledged, in writing, by the lawyer. A lawyer amenable to probation shall be responsible for obtaining the agreement of another lawyer, acceptable to a panel of the Committee, to supervise, monitor, and assist the lawyer as required to fulfill the conditions of probation. Assent to undertake supervision shall be acknowledged in writing to a panel of the Committee. Probation shall be terminated upon the filing of an affidavit by the lawyer showing compliance with the conditions and an affidavit by the supervising lawyer stating probation is no longer necessary and summarizing the basis for that statement. Willful or unjustified non-compliance with the conditions of probation will terminate the probation and subject the lawyer to further disciplinary action, to include imposition of a more severe sanction which could have been imposed originally but for the agreement to probation. An attorney subjected to such further disciplinary action may only offer evidence or argument relating to the willful or unjustified nature of the non-compliance. Unsuccessful rehabilitation or non-completion of the probation conditions will subject the lawyer to further disciplinary proceedings consistent with these Procedures. Except as necessary to the Committee's discharge of its responsibilities, terms and conditions of probation and reports related thereto which involve the lawyer's mental, physical or psychological condition shall be confidential.

RESEARCH REFERENCES

ALR. Disciplining Attorney for Abuse or Misuse of Computer Technology, Including Internet and E-Mail Activities. 46 ALR 6th 365.

CASE NOTES

ANALYSIS
Constitutionality.
Amendment of pleadings.
Disbarment warranted.
Duty of sanctioned attorney.
Interim suspension.

Reciprocal discipline.
Reinstatement denied.
Reprimand.
Surrender of license.
Suspension upheld.
Suspension vacated.

Warning.

Constitutionality.

A prior provision concerning employment of disbarred attorneys directly advances the important governmental interests of consumer protection and the integrity of the legal system and therefore, it is no more restrictive than necessary and does not violate the First Amendment. *Cambiano v. Neal*, — Ark. —, 30 S.W.3d 716, 2000 Ark. LEXIS 542 (2000), opinion withdrawn, substituted opinion 342 Ark. 691, 35 S.W.3d 792 (2000).

A prior provision concerning employment of disbarred attorneys does not violate the Fourteenth Amendment to the United States Constitution or Article 2, § 8, of the Arkansas Constitution, notwithstanding the argument that it took away an attorney's right to liberty and property without due process of law, as the practice of law is a privilege, rather than a property right, and the court's right to control the practice of law was, in and of itself, substantial reason to effectuate his suspension. *Cambiano v. Neal*, — Ark. —, 30 S.W.3d 716, 2000 Ark. LEXIS 542 (2000), opinion withdrawn, substituted opinion 342 Ark. 691, 35 S.W.3d 792 (2000).

The terms "ethically performed" and "direct contact" have solid basis in Rule 5.3 "Responsibilities Regarding Nonlawyer Assistants" in the Model Rules of Professional Conduct [Arkansas Rules of Professional Conduct] and in applicable case law and, therefore, a prior provision concerning employment of disbarred attorneys is not void for vagueness. *Cambiano v. Neal*, — Ark. —, 30 S.W.3d 716, 2000 Ark. LEXIS 542 (2000), opinion withdrawn, substituted opinion 342 Ark. 691, 35 S.W.3d 792 (2000).

Applicable level of review under subdivision (E)(6) of this section was rational basis; because the attorney's disciplinary matter reached the stage of a public hearing, a purpose may be to create and maintain a public record of what occurred, and where a disciplinary matter had reached a stage where the public was informed of it and a public hearing was held, the integrity of the profession was also made public, and a resolution including a permanent record in the official reports was necessary to preserve the integrity of the profession. *Lewellen v. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 641, 110 S.W.3d 263 (2003).

Amendment of Pleadings.

Under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 13, the amendment of disbarment petitions was governed by Ark. R. Civ. P. 15(a), and the denial of the attorney's motions to strike amended pleadings was properly denied. *Ligon v. Walker*, 2009 Ark. 136, 297 S.W.3d 1 (2009).

Disbarment Warranted.

Where an attorney, after his license was temporarily suspended due to his felony conviction for DWI, held himself out as a landlord's attorney, advised the landlord's tenant that the tenant had to vacate leased premises, and represented the landlord at a city council meeting concerning a condemnation matter, the attorney was disbarred pursuant to Ark. Sup. Ct. Prof. Conduct P. § 13(D) because the special judge did not clearly err in concluding (1) that the DWI conviction constituted a serious crime under Ark. Sup. Ct. Prof. Conduct P. § 2(J); (2) that the attorney violated Ark. R. Prof. Conduct 8.4(b); and (3) that the attorney's DWI conviction and unauthorized practice of law in violation of § 16-22-501(a)(2) constituted serious misconduct under subsection (B) of this section. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Attorney was found to have violated numerous Model Rules of Professional Conduct, and he did not challenge the special judge's factual findings in this regard; included among those violations were the conversion of client funds, failing to maintain his trust account records, and continuing to practice law after his license had been suspended, and each of these constituted serious misconduct, as that term was defined in the procedures, subdivisions (B)(1) and (3) of this rule. *Ligon v. Walker*, 2009 Ark. 136, 297 S.W.3d 1 (2009).

Attorney was disbarred as he misappropriated client funds for his own use and took funds from clients as fees for work that was never done, which constituted serious misconduct under subdivisions (B)(1), (3), and (4) of this rule as misappropriation, dishonesty or fraud, and a pattern of similar misconduct. Further, the attorney's prior record of public sanctions demonstrated a substantial disregard of the lawyer's professional duties and responsibilities under subdivision (B)(5); the attorney not only failed to provide services promised, he misled clients about the status of their cases and failed to apprise them when the case was dismissed through his own misconduct. *Ligon v. McCullough*, — Ark. —, 303 S.W.3d 78, 2009 Ark. LEXIS 229 (2009).

Attorney was disbarred for violating Ark. R. Prof'l Conduct 3.1, 3.3(a), 3.4(c), 4.4(a), 8.4(c), and 8.4(d) where the attorney consistently engaged in conduct intended to harass opposing counsel and judges with whom the attorney disagreed and the attorney withheld material information from state and federal courts. *Ligon v. Stilley*, 2010 Ark. 418, — S.W.3d —, 2010 Ark. LEXIS 504 (Nov. 4, 2010).

Duty of Sanctioned Attorney.

An attorney violated a prior version of this rule where he failed to notify opposing counsel of his suspension and failed to file with the courts a copy of a written notice advising

opposing counsel of his suspension. In re Williams, 338 Ark. 479, 995 S.W.2d 349 (1999).

Interim Suspension.

Interim suspension may be imposed immediately upon conviction of a felony, notwithstanding pending postconviction action by the attorney. Wood v. Supreme Court Comm. on Prof'l Conduct, 343 Ark. 696, 38 S.W.3d 310 (2001).

Upon receiving a certified copy of an attorney's judgment of conviction for felony DWI, the Arkansas Supreme Court Committee on Professional Conduct was authorized under Ark. Sup. Ct. Prof. Conduct P. § 16(A)(2) and subdivision (E)(3)(b) of this section to temporarily suspend the attorney's license to practice law because (1) a felony conviction constituted a serious crime under Ark. Sup. Ct. Prof. Conduct P. § 2(J); and (2) pursuant to Ark. Sup. Ct. Prof. Conduct P. § 15(C)(3), the copy of the judgment was conclusive evidence of the attorney's guilt. Ligon v. Stewart, 369 Ark. 380, 255 S.W.3d 435 (2007).

Reciprocal Discipline.

An attorney was disbarred as a matter of reciprocal discipline where (1) she was previously disbarred both in the District of Columbia and by the United States Supreme Court, (2) she was duly served with the petition containing the pertinent, certified copies of those disciplinary proceedings reflecting the serious misconduct found to have been committed in those jurisdictions, and (3) she failed to contest the petition for reciprocal disbarment. In re Jacobs, — Ark. —, 38 S.W.3d 303, 2001 Ark. LEXIS 16 (2001).

An attorney's license to practice law in Arkansas was revoked as reciprocal discipline on the basis of (1) his voluntary resignation from the Texas bar while disciplinary charges were pending against him, and (2) his disbarment in Colorado. In re Torrence, — Ark. —, 37 S.W.3d 576, 2001 Ark. LEXIS 21 (2001).

Attorney's application for reinstatement to the practice of law was denied because of the attorney's unstable financial circumstances and her several dishonest acts in Iowa, which resulted in an 180-day suspension by the Iowa Supreme Court and which constituted "serious misconduct" under subsection (B) of this section. In re Starken, — Ark. —, — S.W.3d —, 2003 Ark. LEXIS 482 (Sept. 25, 2003), opinion withdrawn, substituted opinion 354 Ark. 274, 122 S.W.3d 21 (2003).

Reinstatement Denied.

In addressing an attorney's motion for reinstatement to the Bar of Arkansas, the court noted that each of the attorney's violations upon which an Iowa suspension was based was described as grave and serious by the Iowa Supreme Court and that, under this rule, "serious misconduct" was defined as con-

duct involving dishonesty or misrepresentation which carried with it a sanction terminating or restricting a license to practice law; further, the court noted Ark. Sup. Ct. Prof. Conduct P. § 24 in holding that, although reinstated in Iowa, the attorney's several dishonest acts in Iowa and unstable financial circumstances precluded reinstatement to the Bar of Arkansas at that time. In re Starken, 354 Ark. 274, 122 S.W.3d 21 (2003).

Where, over a period of several years, the attorney was suspended twice in Arkansas for failure to comply with licensing rules, suspended in Iowa for numerous instances of dishonesty, again in Arkansas by reciprocity for the Iowa incidents, and sued for failing to pay the attorney's student loans, the attorney's pattern of dishonesty and financial disarray precluded reinstatement. In re Starken, 354 Ark. 274, 122 S.W.3d 21 (2003).

Reprimand.

Record revealed that the attorney's prior disciplinary record included two warnings, one caution, one reprimand, and one suspension; considering his prior record, a reprimand for violating Ark. Model R. Prof. Conduct 3.1 and 4.4 was not excessive, as the reprimand was a sanction within the discipline allowed for "lesser misconduct." Thompson v. Supreme Court Comm. on Prof'l Conduct, 369 Ark. 186, 252 S.W.3d 125 (2007).

Because an attorney, who was convicted of a single incident of possessing methamphetamine, complied with the terms of the attorney's probation and an assistance program, had no prior disciplinary record, and because there was no evidence that the attorney's misconduct negatively impacted the attorney's representation of a client, a reprimand with probation was warranted under subdivision (E)(4) of this rule. Ligon v. Clouette, 2012 Ark. 21, — S.W.3d —, 2012 Ark. LEXIS 36 (Jan. 26, 2012).

Surrender of License.

There is no provision in the Rules of the Supreme Court for a conditional surrender of a license to practice law, such surrenders are absolute; however, there are provisions for later requests for reinstatement. In re Webster, 307 Ark. 40, 816 S.W.2d 612 (1991).

Attorney was disbarred for serious misconduct where he deprived his firm of fees and, when confronted with his misappropriation, he concocted various methods to avoid detection, and there was a pattern established whereby the attorney wrongfully retained monies that did not belong to him. Ligon v. Newman, 365 Ark. 510, 231 S.W.3d 662 (2006).

Suspension Upheld.

Where attorney admitted he was incompetent in bankruptcy matters and yet filed several motions and complaints, engaged in mul-

multiple hearings in that forum without the requisite competence, his behavior was continually insulting, abusive, and disruptive to the court, to witnesses, and to opposing counsel despite repeated warnings, and his allegations were not founded in fact according to his own admission, and apparently were brought for the purposes of harassment and intimidation, a one-year suspension was not unduly severe. *Dodrill v. Executive Dir.*, 308 Ark. 301, 824 S.W.2d 383 (1992).

Since committee's suspension of attorney was within the range of sanctions for a violation of Model Rule 1.3, the decision of the committee would be affirmed. *Colvin v. Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992).

Attorney's misuse and conversion of client and third-party funds that should have been kept safe in his trust account constituted serious misconduct which warranted termination or restriction of attorney's license and the Arkansas Committee on Professional Conduct Panel's imposition of a reprimand, which was warranted for "lesser" misconduct, was clearly against the preponderance of the evidence; subsection (B) of this section applied, and a suspension of the attorney's license was the proper discipline. *Comm. on Prof'l Conduct v. Revels*, 360 Ark. 69, 199 S.W.3d 630 (2004).

Suspension of attorney's license to practice law was appropriate pursuant to subdivision (D)(2) of this section and Ark. Sup. Ct. Prof. Conduct P. § 18(c) as he engaged in serious misconduct, and his law license was not to be reinstated until and unless the judgment entered in an underlying suit against him was satisfied in full. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

Attorney's repeated and continuous use of strident disrespectful language constituted serious misconduct where the attorney engaged in misconduct that resulted in substantial prejudice to a client; the attorney's conduct in using disrespectful language toward the Arkansas Supreme Court, causing his client's brief to be struck in its entirety, resulted in substantial prejudice to his client, and because the attorney's conduct was serious misconduct under subsection (B) of this section, his six-month suspension was upheld. *Stilley v. Supreme Court Comm. on Prof'l Conduct*, 370 Ark. 294, 259 S.W.3d 395 (2007), cert. denied 552 U.S. 1184, 128 S. Ct. 1248, 170 L. Ed. 2d 67 (2008).

Six-month suspension from practice of law was clearly supported by preponderance of evidence because attorney's conduct easily qualified as serious misconduct involving dishonesty, deceit, fraud, or misrepresentation under subdivision (B)(3) of this rule, and his prior record indicated substantial disregard of lawyer's professional duties and responsi-

bilities under subdivision (B)(5) of this rule. After receiving notice from Supreme Court Committee on Professional Conduct that his license was going to be suspended for three months as result of failure to respond to complaint made to Committee, defendant (1) took on client and accepted from client's mother partial payment of fee requested for representing; and (2) did not tell client or mother that license was shortly due to be suspended. *Young v. Ligon*, 373 Ark. 289, 283 S.W.3d 587 (2008).

Six-week suspension for an attorney's violation of Ark. Model R. Prof. Conduct 1.2(d) and 8.4(c) was not clearly erroneous because it was within the range of sanctions authorized under subdivision (E)(2) of this rule. *Ligon v. Rees*, 2010 Ark. 223, 364 S.W.3d 19 (2010).

Thirty-day suspension from the practice of law was inappropriately lenient where an attorney violated Ark. R. Prof'l Conduct 1.4(b), 1.7(a), 1.7(b), 1.8(e), 1.8(h), and 8.4(d) by failing to explain matters to clients, engaging in conflicts of interest without obtaining consent, dismissing a key defendant in a lawsuit to the prejudice of a client, and providing financial assistance to a client in connection with pending litigation. Pursuant to this rule and Ark. Sup. Ct. P. Reg. Prof'l Conduct § 19, the attorney required a one-year sanction, which was sufficient to deter future violations and to assure that any future clients were protected from such conduct. *Ligon v. Rees*, 2010 Ark. 225, 364 S.W.3d 28 (2010).

Suspension Vacated.

Additional suspension of six months and a fine of \$2,500 as a sanction for an attorney's failure to respond to the committee on professional conduct's complaint was reversed where there was no reason for the attorney to have filed a second document admitting that the untimely filing of the notice of appeal was his fault when the committee had the attorney's motion for belated appeal that he had filed with the Supreme Court of Arkansas. *Gillaspie v. Ligon*, 357 Ark. 50, 160 S.W.3d 332 (2004).

Warning.

Subdivision (E)(6) of this section did not provide that a warning may only be imposed before an Arkansas Committee on Professional Conduct vote, the committee was authorized to issue a warning before preparation of a complaint, and Ark. Sup. Ct. Prof. Conduct P. § 10(D) provided that the committee may impose a warning after a ballot vote; taken together, the two sections authorized the committee to impose a warning at any time prior to a public hearing where the requirements of the sections were met. *Lewellen v. Supreme Court Comm. on Prof'l*

Conduct, 353 Ark. 641, 110 S.W.3d 263 (2003).

Supreme Court Committee on Professional Conduct erred in cautioning an attorney after it found that he violated Ark. R. Prof'l Conduct 8.4(b) by illegally possessing a controlled substance, methamphetamine, a Class C felony and "serious crime" as defined by Ark. Sup. Ct. Prof. Conduct P. § 2(J) and subdivision (B)(6) of this section, because the attorney committed serious misconduct, and the sanction of caution was not available; Ark. Sup. Ct. Prof. Conduct P. § 17(E)(5) states that a caution is appropriate for lesser mis-

conduct. *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011).

Cited: *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996); *Neal v. Hollingsworth*, 338 Ark. 251, 992 S.W.2d 771 (1999); *Neal v. Matthews*, 342 Ark. 566, 30 S.W.3d 92 (2000); *In re Moyer*, 344 Ark. 350, 40 S.W.3d 314 (2001); *In re Davis*, 345 Ark. 46, 43 S.W.3d 156 (2001); *Todd v. Ligon*, 356 Ark. 187, 148 S.W.3d 229 (2004); *Ligon v. Rees*, 2010 Ark. 226, 364 S.W.3d 7 (2010).

Section 18. Fines, costs, and restitution.

In addition to the Committee's authority set forth in Section 17 of these Procedures, a panel of the Committee in any case where a disciplinary sanction is imposed, may:

A. Assess the respondent attorney the costs of the proceedings, including the costs of investigations, witness fees, service of process, depositions, and a court reporter's services;

B. Impose a fine of not more than \$25,000.00; and

C. Order restitution to persons financially injured by the conduct.

CASE NOTES

ANALYSIS

Costs.

Restitution.

Costs.

Chairman of the Supreme Court Committee on Professional Conduct could properly reject a petition for costs filed by the Office of Professional Conduct in an attorney discipline case even though a majority of the Committee had approved the petition where the petition incorrectly stated that the attorney had been found guilty of two ethical violations when, in fact, the attorney had only been found guilty of one. *Cortinez v. Ark. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003).

Restitution.

Supreme Court Committee on Professional Conduct properly denied a request that an

attorney, who was found to have charged an excessive fee for obtaining the release of the attorney's client from a regional hospital, make restitution because there was no evidence presented as to the amount of the overcharge. *Cortinez v. Ark. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003).

Suspension of attorney's license to practice law was appropriate pursuant to Ark. Sup. Ct. Prof. Conduct P. §§ 17(D)(2) and subsection (C) of this section as he engaged in serious misconduct, and his law license was not to be reinstated until and unless the judgment entered in an underlying suit against him was satisfied in full. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

Section 19. Factors to be considered in imposing sanctions.

In addition to any other considerations permitted by these Procedures, a panel of the Committee, in imposing any sanctions, shall consider:

A. The nature and degree of the misconduct for which the lawyer is being sanctioned.

B. The seriousness and circumstances surrounding the misconduct.

C. The loss or damage to clients.

D. The damage to the profession.

E. The assurance that those who seek legal services in the future will be protected from the type of misconduct found.

- F. The profit to the lawyer.
- G. The avoidance of repetition.
- H. Whether the misconduct was deliberate, intentional or negligent.
- I. The deterrent effect on others.
- J. The maintenance of respect for the legal profession.
- K. The conduct of the lawyer during the course of the Committee action.
- L. The lawyer's prior disciplinary record, to include warnings.
- M. Matters offered by the lawyer in mitigation or extenuation except that a claim of disability or impairment resulting from the use of alcohol or drugs may not be considered unless the lawyer demonstrates that he or she is successfully pursuing in good faith a program of recovery.

CASE NOTES

ANALYSIS

Disability.
Remand.
Reprimand.
Suspension.
Written findings.

Disability.

Where there was no evidence that an attorney was involved in a recovery plan, the attorney's claim of disability from the use of alcohol could not be considered as a mitigating or extenuating factor in imposing sanctions under subsection (M) of this section. Accordingly, the attorney's reliance on the Americans with Disabilities Act, 42 U.S.C.S. §§ 12111 to 12213, was misplaced. *Ligon v. Stewart*, 369 Ark. 380, 255 S.W.3d 435 (2007).

Remand.

Supreme Court Committee on Professional Conduct erred in cautioning an attorney after it found that he violated Ark. R. Prof'l Conduct 8.4(b) by illegally possessing a controlled substance, methamphetamine, a Class C felony and "serious crime" as defined by Ark. Sup. Ct. Prof. Conduct P. §§ 2(J) and 17(B)(6), because the attorney committed serious misconduct, and the sanction of caution was not available, and the matter was remanded to the Committee for consideration of the appropriate factors set forth in this section; Ark. Sup. Ct. Prof. Conduct P. § 17(E)(5) states that a caution is appropriate for lesser misconduct. *Ligon v. Clouette*, 2011 Ark. 68, — S.W.3d —, 2011 Ark. LEXIS 66 (Feb. 17, 2011).

Reprimand.

Record revealed that the attorney's prior disciplinary record included two warnings, one caution, one reprimand, and one suspension; considering his prior record, a reprimand for violating Ark. Model R. Prof. Conduct 3.1 and 4.4 was not excessive, as the reprimand was a sanction within the discipline allowed for "lesser misconduct." *Thompson v. Supreme Court Comm. on Prof'l Conduct*, 369 Ark. 186, 252 S.W.3d 125 (2007).

Because an attorney, who was convicted of a single incident of possessing methamphetamine, complied with the terms of the attorney's probation and an assistance program, had no prior disciplinary record, and because there was no evidence that the attorney's misconduct negatively impacted the attorney's representation of a client, a reprimand with probation was warranted under this rule. *Ligon v. Clouette*, 2012 Ark. 21, — S.W.3d —, 2012 Ark. LEXIS 36 (Jan. 26, 2012).

Suspension.

Weighing factors to be considered by Supreme Court Committee on Professional Conduct under this section, six-month suspension from practice of law was clearly supported by preponderance of evidence because attorney's conduct easily qualified as serious misconduct involving dishonesty, deceit, fraud, or misrepresentation under Ark. Sup. Ct. Prof. Conduct P. § 17(B)(3), and his prior record indicated substantial disregard of lawyer's professional duties and responsibilities under Ark. Sup. Ct. Prof. Conduct P. § 17(B)(5). After receiving notice from Committee that his license was going to be suspended for three months as result of failure to respond to complaint made to Committee, defendant (1) took on client and accepted from client's mother partial payment of fee requested for representing; and (2) did not tell client or mother that license was shortly due to be suspended. *Young v. Ligon*, 373 Ark. 289, 283 S.W.3d 587 (2008).

Thirty-day suspension from the practice of law was inappropriately lenient where an attorney violated Ark. R. Prof'l Conduct 1.4(b), 1.7(a), 1.7(b), 1.8(e), 1.8(h), and 8.4(d) by failing to explain matters to clients, engaging in conflicts of interest without obtaining consent, dismissing a key defendant in a lawsuit to the prejudice of a client, and providing financial assistance to a client in connection with pending litigation. Pursuant to Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17 and this rule, the attorney required a one-year

sanction, which was sufficient to deter future violations and to assure that any future clients were protected from such conduct. *Ligon v. Rees*, 2010 Ark. 225, 364 S.W.3d 28 (2010).

Written Findings.

Suspension of attorney's license to practice law was appropriate as it was clear that the Executive Director of the Arkansas Supreme Committee on Professional Conduct consid-

ered this section in its determination; the special judge recognized the loss sustained by the corporation stemming from the attorney's actions but there was no requirement under this section that the special judge make written findings. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

Cited: *Ligon v. Walker*, 2009 Ark. 136, 297 S.W.3d 1 (2009).

Section 20. Surrender of license, discipline by consent.

A. *Surrender of License.* An attorney may surrender his or her license upon the conditions agreed to by the attorney, the Executive Director, and a panel of the Committee. An attorney may offer or consent to the voluntary surrender of his or her license at any time. No petition to the Supreme Court for voluntary surrender of license by an attorney shall be granted until referred to a panel of the Committee and the recommendations of the panel are received by the Supreme Court. (See Section 20(E)(2), for the procedure where there is a disciplinary proceeding pending, if Supreme Court does not accept the voluntary offer of surrender.)

B. *Discipline by Consent.*

(1) An attorney against whom a formal complaint has been served may, at any stage of the proceedings not less than ten (10) business days prior to the commencement of a public hearing before a panel of the Committee, tender a conditional acknowledgment and admission of violation of the Model Rules alleged, or to particular provisions of Model Rules so alleged, in exchange for a stated disciplinary sanction in accordance with the following:

(2) With service of a complaint, the respondent attorney will be advised that if a negotiated disposition by consent is contemplated that the respondent attorney should contact the Executive Director to undertake good faith discussion of a proposed disposition. All discipline by consent proposals must be approved in writing by the Executive Director, before they can be submitted to any other body.

(3) Upon a proposed disposition acceptable to the respondent attorney and the Executive Director, the respondent shall execute and submit a discipline by consent on a document prepared by the Executive Director setting out the necessary factual circumstances, admission of violation of the Model Rules, and the proposed sanction.

(4) The consent proposal, along with copies of the formal complaint, and the recommendations of the Executive Director, shall be presented to a panel of seven members for their votes by written ballot to accept or reject the proposed disposition. The respondent will be notified immediately in writing of the panel decision. Rejection will result in the continuation of the formal complaint process, using a different panel, by a ballot vote pursuant to Section 10 or a public hearing pursuant to Section 11, as the case may be.

C. No appeal can be taken from a disciplinary sanction entered by consent.

D. The panel shall file written evidence of the terms of the discipline by consent with the Clerk.

E. *Serious Misconduct.* If the discipline by consent involves allegations of Serious Misconduct, the Supreme Court shall approve any agreed proposal and any sanction.

(1) The Executive Director shall present to the Supreme Court, under such procedures as the Supreme Court may direct, any discipline by consent proposal involving Serious Misconduct which the Executive Director has reached with a respondent attorney.

(2) If the Supreme Court does not approve of the proposed discipline by consent or the voluntary surrender of license, the matter shall be referred to a panel that has not rendered a decision in the case by ballot vote, which new panel shall resume, as practical, the proceedings at the stage at which they were suspended when the proposal was made and submitted to the Supreme Court. If both regular panels have been used in prior proceedings involving a case, the Committee Chair may form a third panel with seven of the reserve members (five attorneys and two non-attorneys) to hear the case.

(3) The fact that an offer and proposed sanction was agreed to by the Executive Director, the terms of the proposed discipline by consent, and the fact that the Supreme Court rejected the proposal shall not be disclosed to the new panel, except in those instances where disclosure of compromises is permitted under Rule 408 of the Arkansas Rules of Evidence. (Amended Dec. 20, 2001, effective January 1, 2002.)

Section 21. Duties of sanctioned attorney.

In every case in which an attorney is disbarred, suspended, or surrenders his or her license, the attorney shall, within twenty (20) days of the disbarment, suspension or surrender:

A. Notify all of his or her clients and any counsel of record in pending matters in writing that he or she has been disbarred, or suspended, or surrendered his or her license;

B. In the absence of co-counsel, notify all clients in writing to make arrangements for other representation, calling attention to any urgency in seeking the substitution of another attorney;

C. Deliver to all clients being represented in pending matters any papers or property to which they are entitled, or notify them or co-counsel of a suitable time and place where the papers and other property may be obtained, calling attention to any urgency for obtaining the papers and other property;

D. Refund any part of the fees or costs paid in advance that have not been earned or expended;

E. File with the Court, agency or tribunal before which any litigation is pending a copy of the notice to the opposing counsel, or adverse parties if no opposing counsel;

F. Keep and maintain a record for each client of the steps taken to accomplish the foregoing;

G. File with the Clerk and the Committee a list of all other state, federal and administrative jurisdictions to which he or she is licensed or admitted to practice. Upon such filing, the Clerk shall notify those entitled of the disbarment, suspension or surrender.

H. The attorney shall, within thirty (30) days of disbarment, suspension or surrender of license, file an affidavit with the Committee that he or she has fully complied with the provisions of the order and completely performed the foregoing or provide a full explanation of the reasons for his or her noncompliance. Such affidavit shall also set forth the address where communications may thereafter be directed to the respondent.

I. Failure to comply with these Procedures shall subject the attorney to contempt of the Arkansas Supreme Court.

Section 22. Restrictions on former attorneys.

A. For the purposes of this Section, a “former attorney” is any attorney who is disbarred, has surrendered a law license, is on suspension, or is on inactive status.

B.(1) A former attorney providing services to an attorney or law firm under Subsection 22.C shall not occupy, share, or use office space in any location or building where the practice of law is conducted.

(2) A former attorney shall not engage in the practice of law, nor may a former attorney engage in any employment in or related to the practice of law, except as specifically permitted in this Section.

(3) For legal service provided to a client that was not completed prior to becoming a former attorney, a former attorney may receive compensation only on a quantum meruit basis.

(4) A former attorney shall promptly take such action as is necessary to cause the removal of any indicia of lawyer, counselor at law, attorney, legal assistant, law clerk, or similar title from any association with the name of the former attorney.

C. Consistent with the restrictions in Subsection 22.B, a former attorney may provide to attorneys and law firms, whether for or without compensation, services involving legal research, and drafting of briefs and research memorandum, provided the former attorney:

(1) Shall have no contact with clients or prospective clients of any attorney or law firm in person, by telephone, in writing, e-mail, or by any other form of communication;

(2) Shall have no contact with client funds or property;

(3) Any former attorney providing permitted services may be compensated only for the reasonable value of the services provided and shall not be compensated on a contingency basis or share in any way in any fees for legal services provided by an attorney; and

(4) Such services are not provided to any attorney or law firm with whom the former attorney had any employment affiliation as an attorney at the time of the activities which resulted in the attorney becoming a former attorney or at the time of the final action which resulted in the attorney becoming a former attorney.

D. Any attorney or law firm utilizing the services of a former attorney as permitted in this Section shall be responsible for the actions and work product of the former attorney in the rendering of such services and to ensure that the restrictions on a former attorney set out herein are observed.

E. An attorney shall not aid a former attorney in the unauthorized practice of law or in a violation of the restrictions set out herein on former attorneys. An attorney shall have an obligation, as under Model Rule 8.3, to report any violation of this Section by a former attorney.

F. The maximum punishment for an attorney, or any former attorney on suspension or on inactive status, violating this Section may be disbarment. A former attorney previously disbarred or who has surrendered a law license and who violates this Section may be deemed to be in contempt of the Supreme Court and may be punished accordingly. (Amended Dec. 20, 2001, effective January 1, 2002.)

Section 23. Reinstatement.

A. Following any period of suspension from the practice of law, an attorney desiring reinstatement shall file with the Executive Director a verified petition requesting reinstatement.

B. The petition for reinstatement shall be accompanied by proof of payment of an application fee of \$100.00 to the Clerk.

C. The petition for reinstatement shall set out the following:

(1) That the attorney has fully and promptly complied with the requirements of Section 21.

(2) That the attorney has refrained from practicing law during the period of suspension;

(3) That the attorney's license fee is current or has been tendered to the Clerk; and

(4) That the attorney has fully complied with any requirements imposed by the Committee as conditions for reinstatement.

D. Any knowing misstatement of fact may constitute grounds for contempt, denial or revocation of reinstatement.

E. Failure to comply with the provisions of Section 21(G) and (H) shall preclude consideration for reinstatement.

F. No attorney shall be reinstated to the practice of law in this State until the Arkansas Supreme Court has received an affirmative vote by a majority of a panel of the Committee.

Section 24. Readmission to the Bar.

A. No attorney who has been disbarred or surrendered his or her law license in this State shall thereafter be readmitted to the Bar of Arkansas except upon application made to the State Board of Law Examiners in accordance with the Rules Governing Admission To The Bar, or any successor rules, and the approval of the Arkansas Supreme Court.

B. Provided, however, that application for readmission to the Bar of Arkansas shall not be allowed in any of the following circumstances:

(1) Less than five (5) years have elapsed since the effective date of the disbarment or surrender;

(2) The disbarment or surrender resulted from conviction of a Serious Crime in any jurisdiction other than commission of an offense for which the culpable mental state was that of negligence or recklessness; or

(3) Any of the grounds found to be the basis of a disbarment or any grounds presented in a voluntary surrender of law license are of the character and nature of conduct that reflects adversely on the individual's honesty or trustworthiness, whether or not the conviction of any criminal offense occurred.

CASE NOTES

ANALYSIS

Constitutionality.
Reciprocal discipline.
Reinstatement denied.

Constitutionality.

Five-year waiting period for readmission to the bar was properly applied to an attorney who had been disbarred in 2000, even though the rule did not exist at the time of the

attorney's offending conduct, because such a waiting period was not an enlargement of punishment in violation of due process rights. *Cambiano v. Ark. State Bd. of Law Exam'rs*, 357 Ark. 336, 167 S.W.3d 649 (2004).

Reciprocal Discipline.

Attorney's application for reinstatement to the practice of law was denied because of the attorney's unstable financial circumstances

and her several dishonest acts in Iowa, which resulted in an 180-day suspension by the Iowa Supreme Court and which reflected adversely on the attorney's honesty and trustworthiness under subdivision (B)(3) of this section. In re Starken, — Ark. —, — S.W.3d —, 2003 Ark. LEXIS 482 (Sept. 25, 2003), opinion withdrawn, substituted opinion 354 Ark. 274, 122 S.W.3d 21 (2003).

Reinstatement Denied.

In addressing an attorney's motion for reinstatement to the Bar of Arkansas, the court noted that each of the attorney's violations upon which an Iowa suspension was based was described as grave and serious by the Iowa Supreme Court and that, under Ark. Sup. Ct. Prof. Conduct P. § 17(B), "serious misconduct" was defined as conduct involving

dishonesty or misrepresentation which carried with it a sanction terminating or restricting a license to practice law; further, the court noted this rule in holding that, although reinstated in Iowa, the attorney's several dishonest acts in Iowa and unstable financial circumstances precluded reinstatement to the Bar of Arkansas at that time. In re Starken, 354 Ark. 274, 122 S.W.3d 21 (2003).

Where, over a period of several years, the attorney was suspended twice in Arkansas for failure to comply with licensing rules, suspended in Iowa for numerous instances of dishonesty, again in Arkansas by reciprocity for the Iowa incidents, and sued for failing to pay the attorney's student loans, the attorney's pattern of dishonesty and financial disarray precluded reinstatement. In re Starken, 354 Ark. 274, 122 S.W.3d 21 (2003).

Section 25. Inactive status.

A. *Temporary Transfer to Inactive Status.* The Committee is authorized to temporarily transfer an attorney to inactive status in the event that:

- (1) The attorney has been judicially declared incompetent; or
- (2) The attorney has been involuntarily committed due to incapacity or disability; or
- (3) The attorney has alleged incapacity during the course of a disciplinary proceeding against him or her; or
- (4) The attorney is found by the Committee to be culpable of habitual drunkenness or drug use substantially affecting the attorney's fitness to practice law; or
- (5) The attorney is found by the Committee to have appeared in Court while under the influence of alcohol or drugs; or
- (6) The attorney is found by the Committee to be unfit to practice law due to mental infirmity whether or not he or she has been judicially declared incompetent; or
- (7) Without cause, the attorney requests to be transferred to a voluntary inactive status.

B. All trial judges have the duty to, and shall report to the Committee any attorney appearing before them who, in the trial judge's opinion, is under the influence of alcohol or drugs.

C. The Committee may vote by ballot as provided in Section 10 of these Procedures, on the issue of temporary transfer to inactive status or reinstatement due to an event described in subsections A (1), (2), (3) or (7) of this Section.

D. All other temporary transfers of an attorney to inactive status shall be made only after hearings initiated by the Executive Director or others and conducted in the same manner, where applicable, as provided in Section 11 of these Procedures. Provided further, however, the Committee may in its sound discretion hold a closed hearing and seal the record thereof.

E. For good cause shown, the Committee may order the attorney to submit to a medical, psychiatric or psychological examination by a Committee-appointed expert.

F. No attorney shall be entitled to practice in Arkansas while on inactive status in this State. Upon a transfer to inactive status the attorney, or his or her counsel as may be appropriate, shall comply with Section 21 of these Procedures.

G. The Committee may reinstate an attorney to active status upon a showing that any disability has been removed and the attorney is fit to resume the practice of law.

H. Reinstatement shall be accomplished in accordance with the provisions of Section 23.

I. The filing of a petition for reinstatement shall be deemed a waiver of the doctor-patient privilege regarding the disability.

Section 26. Expungement of dismissals.

After three years, the Committee shall expunge all records or other evidence of the existence of complaints terminated by dismissals or referrals to alternative programs pursuant to Section 5(C)(2), except that upon the Executive Director's application, notice to respondent, and a showing of good cause, the Committee may permit the Executive Director to retain such records for one additional period of time not to exceed three years.

A. *Notice to Respondent.* If the respondent was contacted by the Executive Director or Committee concerning the complaint, or the Executive Director or Committee otherwise knows that the respondent is aware of the existence of the complaint, the respondent shall be given prompt written notice of the expungement.

B. *Effect of Expungement.* After a file has been expunged, any response by the Executive Director or Committee to an inquiry requiring a reference to the matter shall state that there is no record of such matter. The respondent may answer any inquiry requiring a reference to an expunged matter by stating that no complaint was made.

Section 27. Contempt.

The following shall be regarded as contempt of the Arkansas Supreme Court:

A. Willful disobedience of any Committee or panel order, summons or subpoena;

B. The refusal to testify on matters not privileged by law;

C. Knowingly to testify falsely before a panel of the Committee;

D. Engaging in the practice of law during a period of suspension;

E. Engaging in the practice of law after a disbarment or surrender of license; or,

F. Violation of these Procedures by any person.

Section 28. Attorney trust account and automatic "overdraft" notification procedure.

A. *Consent By Lawyers.* Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the trust account overdraft reporting and production requirements mandated by this Section.

B. *Overdraft Notification Agreement Required.* A financial institution shall be approved as a depository for lawyer trust accounts only if it files

with the Arkansas Supreme Court Office of Professional Conduct (the "Office") an agreement, in a form provided by the Office, to report to that Office whenever any properly payable instrument is presented against any lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The Office may establish additional procedures, to be approved by the Supreme Court, governing approval and revocation of approved status for financial institutions. The Office shall annually file with the Supreme Court Clerk and the Arkansas IOLTA Foundation, and post on the Court's website, not later than January 1, a current list of approved financial institutions. No attorney or law firm trust account shall be maintained in any financial institution that does not agree to so report and is not approved by the Office. Any such agreement shall apply to all branches of the financial institution and shall not be canceled except upon thirty (30) days written notice to the Office.

C. *Overdraft Reports.* The overdraft notification agreement shall provide that all reports made by the financial institution to the Office shall be in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

D. *Timing of Reports.* Reports under subsection 28.C shall be made simultaneously with, and within the time provided by law for notice of dishonor, if any. If an instrument presented against insufficient funds is honored, then the report shall be made within five (5) banking days of the date of presentation for payment against insufficient funds.

E. *Costs.* Nothing herein shall preclude a financial institution from charging a particular lawyer or law firm for the reasonable cost of producing the reports and records required by this Section.

F. *[Trust Accounts.]* Lawyers who practice law in this state shall deposit all funds held in trust in this jurisdiction in accordance with Rule 1.15(a) of the Model Rules of Professional Conduct in accounts clearly identified as "trust" or "escrow" accounts, referred to herein as "trust accounts," and shall take all steps necessary to inform the depository institution of the purpose and identity of the accounts. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise. Lawyer trust accounts shall be maintained only in financial institutions approved by the Office.

G. *[Account Records.]* Every lawyer engaged in the practice of law in this state shall maintain and preserve for a period of at least five years, after final disposition of the underlying matter, the records of the accounts, including checkbooks, canceled checks, check stubs, vouchers, ledgers, journals, closing statements, accountings or other statements of disbursements rendered to clients or other parties with regard to trust funds or similar equivalent records clearly and expressly reflecting the date, amount, source, and explanation for all receipts, withdrawals, deliveries and disbursements of the funds or other property of a client.

H. *Definitions.* For purposes of this section:

(1) “Financial institution” includes a bank, savings and loan association, credit union, savings bank, and any other business or person that accepts for deposit funds held in trust by lawyers.

(2) “Properly payable” refers to an instrument which, if presented in the normal course of business, is in a form requiring payment under the laws of this jurisdiction.

(3) “Notice of dishonor” refers to the notice that a financial institution is required to give, under the laws of this jurisdiction, upon presentation of an instrument that the institution dishonors.

(4) “Office” means the Office of Professional Conduct of the Arkansas Supreme Court.

I. [*Form.*] The form of the “Attorney Trust Account Overdraft Reporting Agreement” attached hereto, and as may be subsequently revised, is approved for use.

J.(1) *Disapproval or Revocation of Approval of Financial Institutions.* Refusal of the Office to approve a financial institution due to failure of the financial institution to timely submit an initial properly executed written agreement on the form approved by the Court or the Office is not appealable or otherwise subject to challenge, including by civil action in any court.

(2) Approval of a financial institution shall be revoked and the financial institution removed from the list of approved financial institutions if it is found by the Executive Director to have engaged in a pattern of neglect or to have acted in bad faith in not complying with its obligations under the written agreement.

(3) The Executive Director of the Office shall communicate any decision to revoke approval to the financial institution in writing by certified mail at the address given on the agreement. The revocation notice shall state the specific reasons for the revocation decision and advise of any right to reconsideration or review. The financial institution shall have thirty (30) days from the date of receipt of the written notice to file a written request with the Executive Director seeking reconsideration of the Executive Director’s decision or a review of that decision by a panel of the Committee on Professional Conduct. The financial institution may request a review by either ballot vote of a panel or a public hearing before a panel, following the Procedures. The decision of the panel shall be final and not subject to any review. The approved status of the financial institution shall continue until such time as this review process is final.

(4) Once the approval of the financial institution has been finally revoked, the institution shall not thereafter be approved as a depository for attorney trust accounts until such time as the financial institution petitions the Office for new approval, including in the petition a plan for curing any deficiencies that caused its earlier revocation and for periodically reporting compliance with the plan in the future, and approval is granted.

(5) Within fifteen (15) days of receipt of the notice of revocation, or final order of revocation if reviewed by a panel, of its approved status, a financial institution shall give written notification of the revocation action to all holders of attorney trust accounts on deposit with the financial institution, and file a report with the Office of all such attorney notification contacts within thirty (30) days of the date of receipt by the financial institution of the notice or final order of revocation.

(6) Any attorney or law firm receiving notification from a financial institution that the institution's approval as a trust account depository has been revoked shall remove all trust accounts from the financial institution within thirty (30) days of receipt of such notice or by such later date as is required for the payment of all outstanding items payable from the trust account, and shall send written notice of compliance to the Office, including the name and address of the new trust account depository institution.

(7) Failure of any financial institution, attorney, or law firm to comply with the provisions of Section 28 may be treated as contempt of the Arkansas Supreme Court upon petition by the Office, and punished as such upon a finding of contempt. (Adopted February 21, 2002, effective July 1, 2002.)

Publisher's Notes. The subsection headings in F, G, and I were added by the Publisher.

Cross References. Safekeeping property, Rule 1.15, Arkansas Rules of Professional Conduct.

Commentary to Section 28: 1. This Section is generally based on Rule 29 of the Model Rules for Lawyer Disciplinary Enforcement (1996) of the American Bar Association's Standing Committee on Professional Discipline.

2. This Section establishes that consent to the reporting and production requirements mandated by amended Model Rule 1.15 is a condition of the privilege to practice law in Arkansas. This condition is intended to protect financial institutions from claims by lawyer-depositors based on disclosures made by financial institutions, provided that the disclosures are in accordance with this Section. Parties to an overdraft notification agreement are the Court, through its Office of Professional Conduct, and a financial institution. The consent provision in this Section avoids the necessity for financial institutions to draft separate agreements with lawyers to establish consent to overdraft notification or for the attorney disciplinary office to do so with each attorney.

3. The overdraft notification agreement requires that all overdrafts be reported, irrespective of whether the instrument is honored. In light of the purposes of this Section, and in view of ethical proscriptions concerning the preservation of client funds and commingling of client and lawyer funds, it would be improper for a lawyer to accept overdraft privileges or any other arrangement for a personal loan on a client trust account in exchange for the institution's promise to delay or not to report an overdraft.

4. Absence of discretion makes notification by a financial institution an administratively simple matter. An institution which receives an instrument for payment against insufficient funds need not evaluate whether cir-

cumstances require that notification be given; it merely provides notice.

5. It then becomes the responsibility of the disciplinary agency to determine whether further action is necessary. In cases where an overdraft is a result of an accounting error (caused by either the lawyer or the institution), but notification has already been sent to the Office, the institution should provide the lawyer with a written explanation (preferably, an affidavit from an officer of the institution) that the lawyer can then submit to the Office to verify the error.

6. This Section provides the proper format for overdraft reports. In so doing, the Section distinguishes between dishonored instruments and instruments that are presented against insufficient funds but honored. Where instruments are presented against insufficient funds but paid, the Section specifies the information that the institution should provide.

7. Ordinarily, within 24 hours of dishonor an institution gives notice of an overdraft to a depositor whose account is charged. See Uniform Commercial Code, Section 3-508. This is the same time period in which overdraft notification is given to the Office. Where an instrument presented against insufficient funds is honored, the financial institution should send overdraft notification to the agency within five (5) days of the date of presentation.

8. Upon receipt of an overdraft notification, this Section contemplates that the Office will contact the lawyer or firm by telephone and request an explanation for the overdraft. A letter requesting a documented explanation may also be sent. If the overdraft is an accounting error, the lawyer or firm submits a written explanation, including any documents to substantiate the claim. Where the lawyer or firm cannot supply an adequate or complete explanation for the overdraft, other action may be generated, including an audit or a demand for production of the lawyer's books and records.

9. In addition to normal monthly mainte-

nance fees on each account, a lawyer or firm can anticipate additional fees to be charged by the financial institutions for reporting overdrafts in accordance with this Section. However, because financial institutions already flag overdrafts and returned checks, it appears only slightly more burdensome for the institution to forward a copy to the Office. As a result, the additional cost to the lawyer should not be exorbitant.

10. This Section should not be interpreted to allow a lawyer to permit trust account funds to be reduced through deductions made by a financial institution to cover costs of overdraft notification. Such costs should not be borne by clients.

11. Under the laws of most jurisdictions, the definition of “properly payable” will be contained in Section 4-104 of the Uniform Commercial Code.

12. This Section sets forth the requirements for deposit of trust funds in clearly identified trust accounts in approved financial institutions. Funds held not in connection with a representation, such as a trust fund for a lawyer’s own spouse or minor child, do not fall under this Section. This Section also does not concern a lawyer’s own funds properly held in a non-fiduciary capacity, such as funds in a business or personal account.

13. Under Rule 1.15(a) of the Model Rules of Professional Conduct, trust property may be held outside the lawyer’s home jurisdiction upon consent of the client. The overdraft notification rule here governs funds held within the adopting state. A lawyer’s obligation to deposit trust funds in an approved institution will arise upon adoption of the overdraft notification rule in a state where the lawyer deposits trust funds, whether that state is the state wherein the lawyer’s office is situated or some other state.

14. Under the laws of most jurisdictions, the definition of “notice of dishonor” will be determined by reference to Section 3-508 of the Uniform Commercial Code, under which notice must be given by a bank before its midnight deadline and by any other person or institution before midnight on the third business day after dishonor or receipt of notice of dishonor.

**ATTORNEY TRUST ACCOUNT
OVERDRAFT REPORTING
AGREEMENT**

To: Arkansas Supreme Court Office of Professional Conduct (the “Office”)
Justice Building, Room 110
625 Marshall Street
Little Rock, AR 72201-1054

The undersigned, being a duly authorized officer of (name of institution) _____, a financial institution doing business in the State of Arkansas, and the agent of the named financial institution specifically authorized to

enter into this agreement, hereby applies to receive attorney trust accounts in the State of Arkansas. In consideration of approval by the Office of this financial institution, the financial institution agrees to comply with the overdraft reporting requirements for such financial institutions as set forth in Section 28 of the Supreme Court Procedures Regulating Professional Conduct of Attorneys at Law (Rev. 2002) (the “Procedures”), which is incorporated herein by reference, and any other rules or procedures for overdraft reporting promulgated by the Arkansas Supreme Court or the Office, and any later amendments to such rules or procedures.

Specifically, the named financial institution agrees to report to the Office all events involving trust account instruments, and to report in the following format:

(1) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(2) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

All reports shall be made within the following time periods:

(1) In the case of a dishonored instrument, simultaneously with, and within the time provided by law for, notice of dishonor;

(2) In the case of an instrument that is presented against insufficient funds but which instrument is honored, within five (5) banking days of the date of presentation for payment against insufficient funds.

This agreement shall apply to all branches of the named financial institution and shall not be cancelled except upon thirty (30) days written notice to the Executive Director of the Office at the address listed above.

Name and address of financial institution:

Date: _____
Signature of Authorized Official
Corporate Seal _____
Printed or Typed Name of Authorized Official

Title or Position of Authorized Official

ACKNOWLEDGMENT

On this ____ day of _____, 2 _____, before me, a Notary Public for the State of Arkansas, appeared the above-named individual, known to me to the person executing

this instrument, and acknowledged and executed this instrument as his/her free and voluntary act.

Notary Public (signature)

My Commission Expires: _____

ACCEPTANCE

The above-named financial institution is hereby approved by the Arkansas Supreme Court Office of Professional Conduct as a depository for attorney trust accounts in the

State of Arkansas until such time as this agreement is cancelled by the financial institution upon thirty (30) days written notice to the Office, or is revoked by action of the Executive Director of the Office.

Date: _____

Executive Director, Office of Professional Conduct

(01-01-2002 ed.)

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ARKANSAS RULES OF PROFESSIONAL CONDUCT

(Revised, effective May 1, 2005.)

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ARKANSAS RULES OF PROFESSIONAL CONDUCT

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Order of the Court. The per curiam order of the Supreme Court of December 16, 1985, 287 Ark. 495, 702 S.W.2d 326 (1985), read:

"The Arkansas Bar Association, through its Special Committee on the Model Rules of Professional Conduct, has petitioned this court to adopt the Model Rules of Professional Conduct promulgated by the American Bar Association and approved by the House of Delegates of that body on August 2, 1983, subject to certain amendments recommended by the Special Committee and endorsed by the Arkansas Bar Association on January 19, 1985 after a thorough study and review among the bar of Arkansas.

"The Model Rules, as amended, would replace the existing Code of Professional Responsibility adopted by this court effective July 1, 1976 (see Per Curiam order of June 21, 1976, 260 Ark. 910).

"By Per Curiam Order of May 6, 1985, we invited interested parties to file objections to the proposed Model Rules and allowed time for that to be done. No objections have been filed. We note that the Supreme Court Committee on Professional Conduct has filed comments on the proposed rules describing the Model Rules as a definite improvement over the present rules and urging their adoption.

"In view of the thorough study they have received, we find the Model Rules of Professional Conduct should be, and they are hereby, approved as amended, to become effective January 1, 1986. Appended to this order, and made a part hereof by reference, are Exhibit B to the Petition of the Arkansas Bar Association outlining the changes approved by the Arkansas Bar Association by amendment to the Model Rules of the American Bar Association. Also appended hereto, and made a part hereof by reference, is Exhibit C to said Petition which incorporates those changes into the Model Rules. Both exhibits shall be published as an appendix hereto."

The per curiam order of the Supreme Court of March 3, 2005 read:

"The Arkansas Bar Association petitioned the Supreme Court to revise the Arkansas Rules of Professional Conduct by replacing them with proposed rules patterned on the latest version of the American Bar Association Model Rules of Professional Conduct. The

Arkansas Bar Association through its Professional Ethics Committee and the House of Delegates reviewed the American Bar Association's Model Rules and made some changes culminating with the draft rules attached to its petition filed with this Court.

"The Court published the Bar's proposed rules for comment on December 11, 2003. See *In Re Arkansas Bar Association*, 355 Ark. Appx., 129 S.W. 3d 815 (2003). We thank everyone who reviewed the proposal and submitted comments. We thank the Arkansas Bar Association for its work.

"We have studied the proposed rules as well as the comments. Today, we grant the Bar's petition and adopt the Arkansas Rules of Professional Conduct as published at the end of this per curiam order, and they shall be effective as of May 1, 2005. They will replace the existing Rules of Professional Conduct, which became effective January 1, 1986. See *In Re The Arkansas Bar Assoc.*, 287 Ark. Appx. 495, 702 S.W.2d 326 (1985).

"Except as noted below, the Court has made only minor, non-substantive, changes to the rules proposed by the Bar and published for comment. Rules 1.6 and 1.13 that are adopted today are different from those published for comment. Subsequent to the Arkansas Bar Association's petition, the American Bar Association modified its Model Rules 1.6 and 1.13, and the Arkansas Bar Association's House of Delegates requested that the Court substitute rules more in line with the American Bar Association's Model Rules. We agree.

"The other significant departure from the rules as published for comment is Rule 3.8(e). After reviewing the comments and studying the issue, we have decided not to adopt Rule 3.8(e), which placed limitations on the ability of a prosecutor to subpoena a lawyer in a grand jury or other criminal proceeding.

"We urge all attorneys to review these new Arkansas Rules of Professional Conduct and to become familiar with them. To assist in that endeavor, we have reproduced and appended to this order, Exhibits B and C to the Bar's petition. Exhibit B highlights changes between the current Arkansas Rules of Professional Conduct and the rules adopted today. Exhibit C highlights differences between the new Arkansas Rules and the American Bar Association's Model Rules."

RESEARCH REFERENCES

<p>Ark. L. Rev. Note, Orsini v. Larry Moyer Trucking, Inc.: Approaching a Definitive Use of the Model Rules of Professional Conduct in</p>	<p>the Legal Malpractice Context in Arkansas, 46 Ark. L. Rev. 607.</p>
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CASE NOTES

ANALYSIS

In general.
Applicability.

In General.

The Arkansas Rules of Professional Conduct may not be introduced as a basis of civil liability in a legal malpractice case. Harper v. Shackelford, 41 Ark. App. 116, 850 S.W.2d 15 (1993).

Applicability.

These rules are applicable in their entirety in an adjudicative hearing before an admin-

istrative agency. International Paper Co. v. Wilson, 34 Ark. App. 87, 805 S.W.2d 668 (1991).

Trial court correctly excluded testimony of law professor on what is customarily done in the legal profession when an attorney plans to leave a law firm, because the Arkansas Rules of Professional Conduct had no relevance to the interpretation of the agreement at issue. Sexton Law Firm v. Milligan, 329 Ark. 285, 948 S.W.2d 388 (1997), writ denied sub nom. 331 Ark. 439, 959 S.W.2d 747 (1998).

PREAMBLE: A LAWYER'S RESPONSIBILITIES.

[1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[3] In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these Rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., Rules 1.12 and 2.4. In addition, there are Rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See Rule 8.4.

[4] In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

[5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legiti-

mate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process. A lawyer should avoid even the appearance of impropriety.

[6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

[7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

[8] A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation to zealously protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession

is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

[13] Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

[13A] A lawyer owes a solemn duty to uphold the integrity and honor of the profession; to encourage respect for the law and for the courts; to act as a member of a learned profession; to conduct affairs so as to reflect credit on the legal profession; and to inspire the confidence, respect and trust of clients and the public. To accomplish those objectives, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the rules of professional conduct are at issue. The principle pervades these Rules and embodies their spirit.

SCOPE.

[14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.

[15] The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. The Comments are sometimes used to alert lawyers to their responsibilities under such other law.

[16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

[17] Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See Rule 1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

[19] Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. The Rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question and in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations.

[20] Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct

through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

[21] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

RESEARCH REFERENCES

Ark. L. Rev. Recent Development: In re Arkansas Bar Association — Petition to Re-
vise the Arkansas Rules of Professional Conduct, 58 Ark. L. Rev. 1005.

CASE NOTES

Applicability.

Due process requires notice that an act is punishable at the time it is committed. Accordingly, an attorney should be charged under the rule in effect at the time of the alleged misconduct. *Sexton v. Supreme Court Comm.*

on Professional Conduct, 295 Ark. 141, 747 S.W.2d 94 (1988).

These rules require that counsel, like pro se litigants, conform to procedural rules. *Ottens v. State*, 316 Ark. 1, 871 S.W.2d 329 (1994).

ARKANSAS RULES OF PROFESSIONAL CONDUCT

Rule 1.0. Terminology.

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) “Partner” denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) “Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(i) “Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(j) “Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(k) “Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(l) “Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(m) “Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

(n) “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

COMMENT

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (c) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in

determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the

department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a) and 1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel

in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b) and 1.9(a). For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (n).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

CLIENT-LAWYER RELATIONSHIP

Rule 1.1. Competence.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

COMMENT

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily re-

quired where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 6-101(A)(1) provides that a lawyer shall not handle a matter "which he knows or should know that he is not competent to handle, without associating himself with a

lawyer who is competent to handle it." DR 6-101(A)(2) requires "preparation adequate in the circumstances"; Rule 1.1 more fully particularizes the elements of competence.

RESEARCH REFERENCES

Ark. L. Rev. Article, Ethical and Effective Representation in Arkansas Capital Trials, 60 Ark. L. Rev. 1.

CASE NOTES**ANALYSIS**

Contempt.
Court appointments.
Violation upheld.
Withdrawal.

Contempt.

It was improper to hold an attorney in contempt for simply asking for a continuance where there is no evidence the lawyer would have disobeyed the court's order and refused to try the case on the scheduled date if his continuance had been denied, and where the transcript indicated the lawyer had been busy working on his client's case. *Atkinson v. Lofton*, 311 Ark. 56, 842 S.W.2d 425 (1992).

This rule and Ark. R. Prof. Conduct 1.2 imposed a duty on counsel who had been suspended from practicing before a bankruptcy court to consult with his clients of that suspension and any resulting limitations on his ability to provide competent representation. *In re Burnett*, 455 B.R. 187 (Bankr. E.D. Ark. 2011).

Court Appointments.

The right to decide whether an attorney, who regularly practices before a court, can be appointed to represent an indigent in a criminal case is a judicial question, not a legisla-

tive one. *Ball v. Roberts*, 291 Ark. 84, 722 S.W.2d 829 (1987).

Violation Upheld.

Attorney violated this rule and Ark. R. Prof. 1.3 and 8.4(d) where he essentially ignored his plaintiff-clients' case for nearly two years after the defendant's motion to dismiss was filed, and, although he suggested the plaintiffs should obtain another attorney he continued to "work" on the matter and discussed his "progress" with them. *Clark v. Supreme Court Comm. on Professional Conduct*, 320 Ark. 597, 898 S.W.2d 446 (1995).

Withdrawal.

Requirement of competent representation of a client's interest was not set aside simply because counsel was of the opinion that an appeal of his client's case was wholly without merit; counsel's work in the appeal fell short of meeting his obligations under the rules of professional conduct and the Sixth Amendment to the United States Constitution. *Walton v. State*, 94 Ark. App. 229, 228 S.W.3d 524 (2006).

Cited: *Dodrill v. Executive Dir.*, 308 Ark. 301, 824 S.W.2d 383 (1992); *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995).

Rule 1.2. Scope of representation and allocation of authority between client and lawyer.

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a

client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

COMMENT

Scope of Representation Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual

consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of

withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

CODE COMPARISON PRIOR TO 2005 REVISION

Rule 1.2(a) has no counterpart in the Disciplinary Rules of the Code. EC 7-7 states that "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client ..." EC 7-8 states that "In the final analysis, however, the ... decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client. ... In the event that the client in a nonadjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment." DR 7-101(A)(1) provides that "A lawyer shall not intentionally ... fail to seek the lawful objectives of his client through reasonably available means permitted by law. ... A lawyer does not violate this Disciplinary Rule, however, by ... avoiding offensive tactics ..."

Rule 1.2(b) has no counterpart in the Code.

Rule 1.2(c) has no counterpart in the Code.

With regard to paragraph (d), DR 7-102(A)(7) provides that a lawyer shall not

"counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(7) provides that a lawyer shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." DR 7-102(A)(6) provides that a lawyer shall not "participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false." DR 7-106 provides that "A lawyer shall not ... advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal ... but he may take appropriate steps in good faith to test the validity of such rule or ruling." EC 7-5 states that "A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

With regard to Rule 1.2(e), DR 2-110(C)(1)(c) provides that a lawyer may withdraw from representation if a client "insists" that the lawyer engage in "conduct that is illegal or that is prohibited under the Disciplinary Rules." DR 9-101(C) provides that "a lawyer shall not state or imply that he is able to influence improperly ... any tribunal, legislative body or public official."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Hall, Defensive Defense Lawyering or Defending the Criminal Defense Lawyer from the Client, 11 U. Ark. Little Rock L.J. 329.

Dudley, The Continuous Representation Doctrine: Must You Sue Your Lawyer While She Still Represents You?, 19 U. Ark. Little Rock L.J. 241.

CASE NOTES

ANALYSIS

Client consultation.

Testimony.

Client Consultation.

Where it was alleged that the attorney had violated subsection (a) of this rule in that he had failed to consult with his client as to the means by which the objectives of the representation were to be pursued, and that he had engaged in conduct prejudicial to the administration of justice, these charges were found to be untrue. *Purtle v. Committee on Professional Conduct*, 317 Ark. 278, 878 S.W.2d 714 (1994).

Testimony.

Denial of appellant's, an inmate's, petition for postconviction relief was proper because counsel testified that she encouraged the inmate not to testify because the state would ask him about a previous murder conviction; according to trial counsel, the inmate weighed his options, decided to heed her advice, and

chose not to testify. In denying the inmate's petition, the circuit court stated that it did not know any attorney who would encourage a client to testify knowing that the jury would learn about a prior murder conviction and on that issue, the supreme court deferred to the circuit court's superior position to resolve credibility issues. *Lockhart v. State*, 2011 Ark. 396, — S.W.3d —, 2011 Ark. LEXIS 487 (Sept. 29, 2011).

Ark. R. Prof. Conduct 1.1 and this rule imposed a duty on counsel who had been suspended from practicing before a bankruptcy court to consult with his clients of that suspension and any resulting limitations on his ability to provide competent representation. In *re Burnett*, 455 B.R. 187 (Bankr. E.D. Ark. 2011).

Cited: *Harvison v. Charles E. Davis & Assocs.*, 310 Ark. 104, 835 S.W.2d 284 (1992); *Cortinez v. Supreme Court Comm.*, 332 Ark. 456, 966 S.W.2d 251 (1998).

Rule 1.3. Diligence.

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENT

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is

more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client

over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possi-

bility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 6-101(A)(3) requires that a lawyer not "neglect a matter entrusted to him." EC 6-4 states that a lawyer should "give appropriate attention to his legal work." Canon 7 states that "a lawyer should represent a client zealously within the bounds of law." DR 7-101(A)(1) provides that "a lawyer shall not

intentionally... fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules ..." DR 7-101(A)(3) provides that "a lawyer shall not intentionally ... prejudice or damage his client during the course of the relationship ..."

CASE NOTES

ANALYSIS

Due diligence.
Sanctions.
Test.
Violation upheld.

Due Diligence.

Company's attorney failed to exercise due diligence in keeping up with the court's docket to determine whether the December 19, 2003, order had been entered; had the attorney followed up on the entry of the order and shown that he otherwise met the requirements of Ark. R. App. P. Civ. 4(b)(3), the trial court would have been under an absolute obligation to grant his motion for extension of time. *Arkco Corp. v. Askew*, 360 Ark. 222, 200 S.W.3d 444 (2004).

Reviewing court was without jurisdiction to review the appeal because the notice of appeal was not properly and timely filed within thirty (30) days of the "order appealed from," and the conclusion and self-serving allegation that the clerk office's failed to disseminate the order fell far short of establishing the diligence required of the doctors and their attorneys so they could acquire any help or benefit from Ark. R. App. P. Civ. 4(b)(3). *Sloan v. Ark. Rural Med. Prac. Loan & Scholarship Bd.*, 369 Ark. 442, 255 S.W.3d 834 (2007).

In an action challenging the denial of an administratrix's request for a hardship waiver to prevent the recovery of estate assets for Medicaid reimbursement, the trial court

abused its discretion in granting the administratrix's Ark. R. App. P. — Civ. 4(b)(3) motion for an extension of time to file a notice of appeal because the trial court did not hold a hearing or recover any evidence that she had acted diligently; there was also a lack of diligence on the part of the administratrix's counsel for failing to monitor the status of the case. *Tissing v. Ark. Dep't of Human Servs.*, 2009 Ark. 166, 303 S.W.3d 446 (2009).

Sanctions.

Suspension for three months and an award of costs of \$50 was upheld where attorney failed to timely file a notice of appeal in a criminal matter. *Gillaspie v. Ligon*, 357 Ark. 50, 160 S.W.3d 332 (2004).

Attorney was disbarred for misconduct where (1) he applied a \$2600 client payment to his fee rather than the payment of court costs, (2) another client gave the attorney a \$500 check that the attorney cashed without reporting it to his firm, (3) the attorney's secretary prepared a \$1,000 check made payable to a car dealership and a \$500 check made payable to the client, and the attorney signed the client's name to the check and cashed it, and (4) when contacted by a client about a missing \$500 in restitution, the firm sent the client a check from the firm's trust account for \$1,500, but the firm's trust account was then overdrawn by \$500. *Ligon v. Newman*, 365 Ark. 510, 231 S.W.3d 662 (2006).

Attorney was disbarred as he misappropriated client funds for his own use and took fluids from clients as fees for work that was never done, which constituted serious misconduct under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(1), (3) and (4) as misappropriation, dishonesty or fraud, and a pattern of similar misconduct. Further, the attorney's prior record of public sanctions demonstrated a substantial disregard of the lawyer's professional duties and responsibilities under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(5); the attorney not only failed to provide services promised, he misled clients about the status of their cases and failed to apprise them when the case was dismissed through his own misconduct. *Ligon v. McCullough*, — Ark. —, 303 S.W.3d 78, 2009 Ark. LEXIS 229 (2009).

Test.

The test for ineffective assistance of counsel in a criminal case consists of two components: deficient performance by counsel, and prejudice suffered by the defendant; the defendant is not entitled to appellate relief unless he

makes the requisite showing on both components. *McDonald v. State*, 42 Ark. App. 37, 852 S.W.2d 833 (1993).

Violation Upheld.

Evidence supported finding that attorney violated this rule. *Colvin v. Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992).

Attorney violated this rule and Ark. R. Prof. 1.1 and 8.4(d) where he essentially ignored his plaintiff-clients' case for nearly two years after the defendant's motion to dismiss was filed, and, although he suggested the plaintiffs should obtain another attorney he continued to "work" on the matter and discussed his "progress" with them. *Clark v. Supreme Court Comm. on Professional Conduct*, 320 Ark. 597, 898 S.W.2d 446 (1995).

Cited: *Colvin v. Committee on Professional Conduct*, 305 Ark. 239, 806 S.W.2d 385 (1991); *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995); *Arnold v. Camden News Publ. Co.*, 353 Ark. 522, 110 S.W.3d 268 (2003).

Rule 1.4. Communication.

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall promptly notify a client in writing of the actual or constructive receipt by the attorney of a check or other payment received from an insurance company, an opposing party, or from any other source which constitutes the payment of a settlement, judgment, or other monies to which the client is entitled.

COMMENT

[1] Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the law-

yer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's

objectives. In some situations - depending on both the importance of the action under consideration and the feasibility of consulting with the client - this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to

injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client. Practical exigency may also require a lawyer to act for a client without prior consultation.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

CODE COMPARISON PRIOR TO 2005 REVISION

This Rule has no direct counterpart in the Disciplinary Rules of the Code. DR 6-101(A)(3) provides that a lawyer shall not "neglect a legal matter entrusted to him." DR 9-102(B)(1) provides that a lawyer "shall promptly notify a client of the receipt of his funds, securities, or other properties." EC 7-8

states that "a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations." EC 9-2 states that "a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client."

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, Changing Firms or Offices: Doing it Right, 2002 Ark. L. Notes 39.

CASE NOTES

ANALYSIS

Inadequate communication.
Sanctions.
Staff communications.

Inadequate Communication.

Attorney was disbarred for misconduct where (1) he applied a \$2600 client payment to his fee rather than the payment of court costs, (2) another client gave the attorney a \$500 check that the attorney cashed without reporting it to his firm, (3) the attorney's secretary prepared a \$1,000 check made payable to a car dealership and a \$500 check made payable to the client, and the attorney signed the client's name to the check and cashed it, and (4) when contacted by a client about a missing \$500 in restitution, the firm sent the client a check from the firm's trust account for \$1,500, but the firm's trust account was then overdrawn by \$500. *Ligon v. Newman*, 365 Ark. 510, 231 S.W.3d 662 (2006).

Sanctions.

Attorney was disbarred as he misappropriated client funds for his own use and took fluids from clients as fees for work that was never done, which constituted serious miscon-

duct under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(1), (3) and (4) as misappropriation, dishonesty or fraud, and a pattern of similar misconduct. Further, the attorney's prior record of public sanctions demonstrated a substantial disregard of the lawyer's professional duties and responsibilities under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(5); the attorney not only failed to provide services promised, he misled clients about the status of their cases and failed to apprise them when the case was dismissed through his own misconduct. *Ligon v. McCullough*, — Ark. —, 303 S.W.3d 78, 2009 Ark. LEXIS 229 (2009).

Staff Communications.

Where an attorney relied entirely upon a nonlawyer staff member to communicate with a client regarding the firm's legal representation of her, he violated this section. *Mays v. Neal*, 327 Ark. 302, 938 S.W.2d 830 (1997).

Cited: *Colvin v. Committee on Professional Conduct*, 305 Ark. 239, 806 S.W.2d 385 (1991); *Harvison v. Charles E. Davis & Assocs.*, 310 Ark. 104, 835 S.W.2d 284 (1992); *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995); *Shibley v. State*, 324 Ark. 212, 920 S.W.2d 10 (1996).

Rule 1.5. Fees.

(a) A lawyer's fee shall be reasonable. A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a

regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. Provided, however, after a final order or decree is entered a lawyer may enter into a contingent fee contract for collection of payments which are due pursuant to such decree or order; or

(2) a contingent fee for representing a defendant in a criminal case.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved; and

(3) the total fee is reasonable.

Publisher's Notes. The Per Curiam order of the Supreme Court entered on January 23, 1989, provided: "The Model Code of Professional Responsibility EC 2-20 (1980) provides that because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations are rarely justified. *See also Stuart M. Speiser, 1 Attorneys' Fees*, §§ 2.6 and 2.28 (1973). In fact, this court has held that contingent fee contracts in domestic relations cases that might tend to prevent reconciliation between a husband and wife are void or against public policy. *See McDearmon v. Gordon & Gremillion*, 247 Ark. 318, 445 S.W.2d 488 (1969); *McConnell v. McConnell*, 98 Ark. 193, 136 S.W. 931 (1911). Accordingly, Rule 1.5(d) of the Arkansas Model Rules of Professional Conduct provides that a lawyer shall not enter into an arrangement for, charge, or collect any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof. "Pres-

ently, our model rules fail to address whether a lawyer may enter into such a contingent fee arrangement to collect support arrearages that have accrued pursuant to a final order or decree that previously established or awarded support or alimony. Federal law, however, has been enacted to facilitate the enforcement of child support orders and decrees and in doing so, provides that states be paid a percentage of all collections made on behalf of children receiving AFDC and are also allowed to recover their costs of collection from support payments made on behalf of children not receiving AFDC. *See* 42 USC §§ 655-658 (Supp. 1988). Contingent fee contracts entered into between attorneys and clients for the collection of support arrearages clearly do not confront the same public policy consideration as those agreements which make a fee dependent upon securing a divorce or minimum support, alimony or property amounts. Instead, such agreements entered for collection of support arrearages provide an incentive for attorneys to take such cases when often the custodial parent has little or no

money to retain an attorney to file the required post-decretal action.

"For the foregoing reasons, Rule 1.5(d) of

the Model Rules of Professional Conduct, as adopted by our per curiam of December 16, 1985, is amended."

COMMENT

Reasonableness of Fee and Expenses

[1A] This rule is designed to prohibit only unreasonably high fees and is not to be construed as prohibiting free services, reduced fees or pro bono legal services.

[1] Paragraph (a) requires that lawyers charge fees that are reasonable under the circumstances. The factors specified in (1) through (8) are not exclusive. Nor will each factor be relevant in each instance. Paragraph (a) also requires that expenses for which the client will be charged must be reasonable. A lawyer may seek reimbursement for the cost of services performed in-house, such as copying, or for other expenses incurred in-house, such as telephone charges, either by charging a reasonable amount to which the client has agreed in advance or by charging an amount that reasonably reflects the cost incurred by the lawyer.

Basis or Rate of Fee

[2] When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee and the expenses for which the client will be responsible. In a new client-lawyer relationship, however, an understanding as to fees and expenses must be promptly established. Generally, it is desirable to furnish the client with at least a simple memorandum or copy of the lawyer's customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation. A written statement concerning the fee terms of the engagement reduces the possibility of misunderstanding.

[3] Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law also may apply to situations other than a contingent fee, for

example, government regulations regarding fees in certain tax matters.

Terms of Payment

[4] A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[5] An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures.

Prohibited Contingent Fees

[6] Paragraph (d) prohibits a lawyer from charging a contingent fee in a domestic relations matter when payment is contingent upon the securing of a divorce or upon the amount of alimony or support or property settlement to be obtained. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

Division of Fee

[7] A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to

divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the association of other counsel, and the agreement must be confirmed in writing. Contingent fee agreements must be in a writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

[8] Paragraph (e) does not prohibit or regulate division of fees to be received in the

future for work done when lawyers were previously associated in a law firm.

Disputes over Fees

[9] If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer must comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 2-106(A) provides that "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." DR 2-106(B) provides that "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." DR 2-106(B) further provides that "Factors to be considered ... in determining ... reasonableness ... include ...: (1) The time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar services. (4) The amount involved and the results obtained. (5) The time limitations imposed by the client or by the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent." The Rule in-

cludes the factor of ability to pay; a person of ample means may justly be charged more for a service, and a person of limited means less, other factors being the same. EC 2-17 states that "A lawyer should not charge more than a reasonable fee ..."

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that "It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

With regard to Rule 1.5(c), DR 2-106(C) prohibits "a contingent fee in a criminal case."

With regard to Rule 1.5(d), DR 2-107(A) permits division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation ..." Rule 1.5(d) permits division without regard to the services rendered by each lawyer if they assume joint responsibility for the representation.

RESEARCH REFERENCES

ALR. Validity and enforceability of express fee-splitting agreements between attorneys. 11 ALR 6th 587.

Court Rules and Rules of Professional Conduct Limiting Amount of Contingent Fees or Otherwise Imposing Conditions on Contingent Fee Contracts. 49 ALR 6th 505.

Ark. L. Rev. Note, Henry, Walden & Davis v. Goodman: The Value of a Discharged Attorney's Contingent Fee Contract in Arkansas, 42 Ark. L. Rev. 549.

U. Ark. Little Rock L. Rev. Annual Survey of Caselaw, Ethics Law, 26 U. Ark. Little Rock L. Rev. 907.

CASE NOTES

ANALYSIS

Domestic relations matter.

Reasonableness.

Sanctions.

Domestic Relations Matter.

Attorney's fees of \$8,000 awarded in child custody modification action under the authority of § 9-12-309(a). *Jones v. Jones*, 327 Ark. 195, 938 S.W.2d 228 (1997).

Reasonableness.

Given the nature, complexity and duration of the case, the attorney's fee awarded was reasonable. *Sutton v. Ryder Truck Rental, Inc.*, 305 Ark. 231, 807 S.W.2d 905 (1991).

The amount of a retainer is not the sole consideration in determining whether a fee is reasonable; if a lawyer charges a reasonable retainer and is retained for the purpose of providing specified services, but never performs those services, the fee charged would become unreasonable. *Arens v. Committee on Professional Conduct*, 307 Ark. 308, 820 S.W.2d 263 (1991).

Attorney's fee of \$5,750 to obtain the release of a client's husband from a regional hospital was excessive in light of the amount of work performed; although attorney was publicly cautioned, he was not ordered to pay restitution because no evidence was presented regarding the amount of the overcharge. *Cortinez v. Ark. Supreme Court Comm. on Prof'l Conduct*, 353 Ark. 104, 111 S.W.3d 369 (2003).

Attorney did not violate this rule; although the attorney charged more than originally contracted, the attorney remedied the situation and reimbursed the client the overcharge, even though it was after a grievance had been filed. *Ligon v. Rees*, 2010 Ark. 227, 364 S.W.3d 1 (2010).

Sanctions.

Attorney was disbarred as he misappropriated client funds for his own use and took fluids from clients as fees for work that was never done, which constituted serious misconduct under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(1), (3) and (4) as misappropriation, dishonesty or fraud, and a pattern of similar misconduct. Further, the attorney's prior record of public sanctions demonstrated a substantial disregard of the lawyer's professional duties and responsibilities under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(5); the attorney not only failed to provide services promised, he misled clients about the status of their cases and failed to apprise them when the case was dismissed through his own misconduct. *Ligon v. McCullough*, — Ark. —, 303 S.W.3d 78, 2009 Ark. LEXIS 229 (2009).

Cited: *Mason v. Jackson*, 323 Ark. 252, 914 S.W.2d 728 (1996); *Page v. Anderson*, 85 Ark. App. 538, 157 S.W.3d 575 (2004); *Scott v. Estate of Prendergast*, 90 Ark. App. 66, 204 S.W.3d 110 (2005).

Rule 1.6. Confidentiality of information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the commission of a criminal act;

(2) to prevent the client from committing a fraud that is reasonably certain to result in injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the

client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client or,

(6) to comply with other law or a court order.

(c) Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation or the like.

COMMENT

[1A] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence

concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client or a third person intends to commit a crime and may reveal that information to prevent the crime. The overriding value of life and physical integrity permits disclosure reasonably necessary to

prevent death or bodily harm. Other future harms as a result of a criminal act, such as fraud, damage to economic interests, or loss of property which are reasonably certain to occur, also permit disclosure if necessary to eliminate the threat. Several situations must be distinguished.

[a] First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(3) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

[b] Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

[c] Third, the lawyer may learn that a client, or a third person, intends prospective conduct that is criminal. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent the crime which the lawyer reasonably believes is intended by the client or a third person. It is, of course, sometimes difficult for a lawyer to "know" when such a purpose will actually be carried out, for the client or the third person may have a change of mind.

[d] The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1), (b)(2) or (b)(3) does not violate this Rule.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a fraud, as defined in Rule 1.0 (d), that is reasonably certain to result in injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the

client's misconduct the lawyer may not counsel or assist the client in conduct the lawyer knows is fraudulent. See Rule 1.2 (d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13 (c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected person to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an

assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] Paragraph (b) permits but does not require the disclosure of information relating

to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

CODE COMPARISON PRIOR TO 2005 REVISION

The general principle of confidentiality is enlarged, under Rule 1.6, in that the confiden-

tiality requirement applies to all information about a client "relating to the representation."

Under the Code, DR 4-101, the requirement applies only to information governed by the attorney-client privilege and to information "gained in" the professional relationship that "the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." Rule 1.6 thus imposes confidentiality on information relating to the representation even if it is acquired before or after the relationship existed. It does not require the client to indicate information that is to be confidential, or permit the lawyer to speculate whether particular information might be embarrassing or detrimental. Furthermore, this definition avoids the constricted definition of "confidence" that appears in some decisions.

See *Allegaert v. Perot*, 434 F. Supp. 790 (S.D.N.Y. 1977); *Moritz v. Medical Protective Co.*, 428 F. Supp. 865 (W.D. Wis. 1977); *City of Wichita v. Chapman*, 521 P.2d 589 (Kan. 1974).

Rule 1.6(a) permits a lawyer to disclose information where impliedly authorized in

order to carry out the representation. Under DR 4-101(B) and (C), a lawyer cannot disclose "confidences" unless the client first expressly consents after disclosure.

Rule 1.6(b)(1) is similar to DR 4-101(C)(3), which provides that a lawyer "may reveal the intention of his client to commit a crime and the information necessary to prevent the crime." This option exists regardless of the seriousness of the proposed crime.

With regard to Rule 1.6(b)(2), DR 4-101(C)(4) provides that a lawyer may reveal "confidences or secrets necessary to establish or collect his fee or to defend himself or his employers or associates against an accusation of wrongful conduct." Rule 1.6(b)(2) enlarges the exception to include disclosure of information relating to claims by the lawyer other than for his fee; for example, recovery of property from the client. It narrows the exception dealing with defense against claims of wrongful conduct to situations where the client's conduct was involved. (Amended March 14, 1988.)

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey — Miscellaneous, 11 U. Ark. Little Rock L.J. 235.

CASE NOTES

ANALYSIS

Organization as client.
Permitted testimony.

Organization As Client.

When a business entity is the client, the protected communications are between the attorney and the appropriate representatives or employees of the entity. In re Hutchins, 216 B.R. 11 (Bankr. E.D. Ark. 1997).

While it is true that a corporation can only act through human beings, and the authority to assert and waive privilege rests with management, a dissident director is not management; such a director has no authority to frustrate the attorney-client privilege when

the privilege is asserted by the corporation, i.e., by the majority of directors. In re Hutchins, 216 B.R. 11 (Bankr. E.D. Ark. 1997).

Permitted Testimony.

Attorney permitted to testify regarding her observations of her client's treatment of client's children and the conditions in the home, while attorney was a guest there. Nance v. Arkansas Dep't of Human Servs., 316 Ark. 43, 870 S.W.2d 721 (1994).

Cited: Drayton v. State, 23 Ark. App. 1, 740 S.W.2d 147 (1987); Burnette v. Morgan, 303 Ark. 150, 794 S.W.2d 145 (1990).

Rule 1.7. Conflict of interest: current clients.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another clients; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer,

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing,

COMMENT

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer must withdraw from the representation, unless the lawyer has obtained the informed consent of the

client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. Comments (5) and (29).

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to

cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverse-ness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be diffi-

cult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] When lawyers representing different clients in the same matter or in substantially related matters are closely related by blood or marriage, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and independent professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer related to another lawyer, e.g., as parent, child, sibling or spouse, ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from a close family relationship is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rule 1.10 and Rule 1.8 (l).

[12] A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship. See Rule 1.8(j).

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement, and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after con-

sultation and the arrangement ensures the lawyer's professional independence. If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation. See Rule 1.1 (competence) and Rule 1.3 (diligence).

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a media-

tion (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the

decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in posi-

tions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and

intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated.

Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each cli-

ent is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is

material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Conflict Charged by an Opposing Party

[36] Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See Scope.

[37] As an integral part of the lawyer's duty to prevent conflict of interests, the lawyer must strive to avoid not only professional impropriety, but also the appearance of impropriety. The duty to avoid the appearance of impropriety is not a mere phrase. It is part of the foundation upon which are built the rules that guide lawyers in their moral and ethical conduct. This obligation should be considered in any instance where a violation of the Rules of Professional Conduct are at issue. The principle pervades these Rules and embodies their spirit.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 5-101(A) provides that "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of the client will be or reasonably may be affected by his own financial, business, property, or personal interests." DR 5-105(A) provides that "A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent

permitted under DR 5-105(C)." DR 5-105(C) provides that "In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services."

Rule 1.7 goes beyond DR 5-105(A) in requiring that, when the lawyer's other interests are involved, not only must the client consent after consultation but also that, independent of such consent, the representation reasonably appears not to be adversely affected by the lawyer's other interests. This requirement appears to be the intended meaning of the provision in DR 5-105(C) that "it is obvi-

ous that he can adequately represent" the client, and is implicit in EC 5-2, which states that "A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable possibility that they will, adversely affect the advice to be given or services to be rendered the prospective client."

RESEARCH REFERENCES

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U. Ark. Little Rock L.J. Note, Attorney and Client — Conflict of Interest — Prohibi-

tion Against Appearance of Impropriety Retained Under Model Rules of Professional Conduct. First American Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990), 13 U. Ark. Little Rock L.J. 271.

Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

CASE NOTES

ANALYSIS

Appearance of impropriety.

Conduct toward opposing parties.

Corporate representation.

Discretion.

Inherent conflicts.

No conflict of interest.

Appearance of Impropriety.

Court has consistently taken strong positions in situations where the public's confidence in attorneys might be eroded by the appearance of a conflict of interest; and the fact that Canon 9 of the ABA Code of Professional Responsibility is not in the Arkansas Rules of Professional Conduct does not mean that lawyers no longer have to avoid the appearance of impropriety. First Am. Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990).

Court found no appearance of impropriety established where firm represented hospital's insurer in defense of plaintiff's malpractice claim and then represented the hospital in defense of plaintiff's Freedom of Information Act claim, even if firm was found to be "materially limited" in its representation of hospital, as hospital gave its consent after consultation. Saline Mem. Hosp. v. Berry, 321 Ark. 588, 906 S.W.2d 297 (1995).

Conduct Toward Opposing Parties.

Where victim provided no evidence of store's counsel's personal animus toward victim or evidence of counsel placing personal interests over store's interests, trial court did not err by denying victim's motion to disqualify store's counsel. Whaley v. Kroger Co., 352 Ark. 122, 98 S.W.3d 824 (2003).

Corporate Representation.

Insurance company was prohibited by § 16-22-211 from appointing one of its in-house attorneys to represent a defendant insured in litigation arising out of an accident. It was undisputed that the insurer was not and would not become a party to the lawsuit as provided in one of the exceptions to § 16-22-211. Brown v. Kelton, 2011 Ark. 93, — S.W.3d —, 2011 Ark. LEXIS 85 (Mar. 3, 2011).

Discretion.

By finding that it should not disqualify an attorney except on a basis that would mandate a mistrial, but that it should instead defer to the individual attorney to decide whether a conflict existed in accordance with the attorney's own judgment, the chancery court erred. Norman v. Norman, 333 Ark. 644, 970 S.W.2d 270 (1998).

A violation of the Arkansas Rules of Professional Conduct does not automatically compel disqualification; rather, such matters involve the exercise of judicial discretion. Norman v. Norman, 333 Ark. 644, 970 S.W.2d 270 (1998).

Inherent Conflicts.

When a lawyer is on the board of a hospital, the lawyer owes a fiduciary duty to the hospital, and the lawyer should not take any action that conflicts with that duty, such as filing a suit against the hospital. After the lawyer's term on the board ends, the lawyer should not take any action to the detriment of the hospital when that action is based upon confidential information the attorney gained during the fiduciary relationship. Berry v. Saline Mem. Hosp., 322 Ark. 182, 907 S.W.2d 736 (1995).

No Conflict of Interest.

Evidence sufficient to find that there was not a conflict of interest. *Brewer v. Lacefield*, 301 Ark. 358, 784 S.W.2d 156 (1990).

There was no violation of this rule where the lawyers who brought wrongful death action had only one client, the surviving spouse as personal representative, and the court's later determination that the surviving spouse should have been removed because of the invalidity of the marriage and her lack of priority for appointment as administratrix under the probate code, had no bearing on evaluation of the conduct of the lawyers who brought the wrongful death action with permission of the court. *Standridge v. Standridge*, 304 Ark. 364, 803 S.W.2d 496 (1991).

Arguments made by the attorney for an estate in an ancillary probate proceeding on

behalf of the personal representative charged with probating the decedent's holographic will which happened to be consistent with the interests of the sole devisee under the will did not prejudice the remaining potential heirs and did not require his disqualification from representing the estate; his actions throughout the proceedings reflected conscientious legal services consistent with the duties of counsel for a personal representative in an ancillary probate. *Craig v. Carrigo*, 340 Ark. 624, 12 S.W.3d 229 (2000).

Cited: *Womack v. First State Bank*, 21 Ark. App. 33, 728 S.W.2d 194 (1987); *Purtle v. McAdams*, 317 Ark. 499, 879 S.W.2d 401 (1994), overruled in part *Weigel v. Farmers Ins. Co.*, 356 Ark. 617, 158 S.W.3d 147 (2004); *In re Starr*, 986 F. Supp. 1144 (E.D. Ark. 1997); *Etoch v. Simes*, 340 Ark. 449, 10 S.W.3d 866 (2000).

Rule 1.8. Conflict of interest: current clients: specific rule.

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, in a writing signed by the client, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a person within the third degree of relationship to the lawyer or the client. The following persons are relatives with the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grand child, great-grand child, nephew or niece.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is represented by independent legal counsel, or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them,

(l) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person whom the lawyer knows is represented by the other lawyer except upon informed consent by the client, confirmed in writing.

COMMENT

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The require-

ments of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to ex-

isting clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), 8.1 and 8.3.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner

or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts. Similarly, an exception allowing lawyers representing indigent clients to pay court costs and litigation expenses regardless of whether these funds will be repaid is warranted.

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ

from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and

other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth

in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] When the client is an organization, paragraph (j) of this Rule prohibits a lawyer for the organization (whether inside counsel

or outside counsel) from having a sexual relationship with a constituent of the organization who supervises, directs or regularly consults with that lawyer concerning the organization's legal matters.

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all law-

yers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

CODE COMPARISON PRIOR TO 2005 REVISION

This Rule deals with certain transactions that per se involve conflict of interest.

With regard to Rule 1.8(a), DR 5-104(A) provides that "A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure." EC 5-3 states that "A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested."

With regard to Rule 1.8(b), DR 4-101(B)(3) provides that a lawyer shall not "use a confidence or secret of his client for the advantage of himself, or of a third person, unless the client consents after full disclosure."

There is no counterpart to Rule 1.8(c) in the Disciplinary Rules of the Code. EC 5-5 states that "A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or overreached the client. If a client voluntarily of-

fers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that the client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client."

Rule 1.8(d) is substantially similar to DR 5-104(B), but refers to "literary or media" rights, a more generally inclusive term than "publication" rights.

Rule 1.8(e)(1) is similar to DR 5-103(B), but eliminates the requirement that "the client remain ultimately liable for such expenses."

Rule 1.8(e)(2) has no counterpart in the Code.

Rule 1.8(f) is substantially identical to DR 5-107(A)(1).

Rule 1.8(g) is substantially identical to DR 5-106.

The first clause of Rule 1.8(h) deals with the same subject as DR 6-102(A). There is no counterpart in the Code to the second clause of Rule 1.8(h).

Rule 1.8(i) has no counterpart in the Code.

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, *Ethical Issues in Representing Clients with Diminished Capacity*, 2003 Ark. L. Notes 57.

U. Ark. Little Rock L.J. Note, *Attorney and Client — Conflict of Interest — Prohibition Against Appearance of Impropriety Re-*

tained Under Model Rules of Professional Conduct. First American Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990), 13 U. Ark. Little Rock L.J. 271.

Survey, *Professional Responsibility*, 13 U. Ark. Little Rock L.J. 393.

CASE NOTES

In General.

There is a significant difference between the old rule, former Rule 5-104(A) of the Code of Professional Responsibility, and this rule. *Sexton v. Supreme Court Comm. on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988).

Cited: *Dumond v. State*, 294 Ark. 379, 743 S.W.2d 779 (1988); *Union Nat'l Bank v. Barnhart*, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

Rule 1.9. Duties to former clients.

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent confirmed in writing,

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

COMMENT

[1] After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule. Under this Rule, for example, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client. So also a lawyer who has prosecuted an accused person could not properly represent the accused in a subsequent civil action against the government concerning the same transaction. Nor could a lawyer who has represented multiple clients in a matter represent one of the clients against the others in the same or a substantially related matter after a dispute arose among the clients in that matter, unless all affected clients give informed consent. See Comment [9]. Current and former government lawyers must comply with this Rule to the extent required by Rule 1.11.

[2] The scope of a "matter" for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree. When a lawyer has been directly involved in a specific transaction, subsequent representation of other clients with materially adverse interests in that transaction clearly is prohibited. On the other hand, a lawyer who recurrently handled a type of problem for a former client is not precluded from later representing another client in a factually distinct problem of that type even

though the subsequent representation involves a position adverse to the prior client. Similar considerations can apply to the reassignment of military lawyers between defense and prosecution functions within the same military jurisdictions. The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question.

[3] Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for non-payment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will

not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

Lawyers Moving Between Firms

[4] When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

Confidentiality

[5] Paragraph (b) operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the

firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

[6] Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

[7] Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented. See Rules 1.6 and 1.9(c).

[8] Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

[9] The provisions of this Rule are for the protection of former clients and can be waived if the client gives informed consent, which consent must be confirmed in writing under paragraphs (a) and (b). See Rule 1.0(e). With regard to the effectiveness of an advance waiver, see Comment [22] to Rule 1.7. With regard to disqualification of a firm with which a lawyer is or was formerly associated, see Rule 1.10.

[10] The duty to avoid the appearance of impropriety discussed in Comment [37] to Rule 1.7 is likewise applicable to Rule 1.9 and Rule 1.10.

CODE COMPARISON PRIOR TO 2005 REVISION

There was no counterpart to this Rule in the Disciplinary Rules of the Model Code.

Representation adverse to a former client was sometimes dealt with under the rubric of

Canon 9 of the Model Code, which provided: "A lawyer should avoid even the appearance of impropriety." Also applicable were EC 4-6 which stated that the "obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment" and Canon 5 which stated that "[a] lawyer should exercise independent professional judgment on behalf of a client."

The provision for waiver by the former client in paragraphs (a) and (b) is similar to DR 5-105(C).

The exception in the last clause of paragraph (c)(1) permits a lawyer to use information relating to a former client that is in the "public domain," a use that was also not prohibited by the Model Code, which protected only "confidences and secrets." Since the scope of paragraphs (a) and (b) is much broader than "confidences and secrets," it is necessary to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated.

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, Changing Firms or Offices: Doing it Right, 2002 Ark. L. Notes 39.

U. Ark. Little Rock L.J. Morgan, Screening the Disqualified Lawyer, etc., 10 U. Ark. Little Rock L.J. 37.

Note, Attorney and Client — Conflict of Interest — Prohibition Against Appearance of

Impropriety Retained Under Model Rules of Professional Conduct. First American Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990), 13 U. Ark. Little Rock L.J. 271.

Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Survey, Attorney and Client, 14 U. Ark. Little Rock L.J. 257.

CASE NOTES

ANALYSIS

Appearance of impropriety.

Associations.

Duty of counsel.

Substantially related matter.

Waiver.

Appearance of Impropriety.

Court has consistently taken strong positions in situations where the public's confidence in attorneys might be eroded by the appearance of a conflict of interest; and the fact that Canon 9 of the ABA Code of Professional Responsibility is not in the Arkansas Rules of Professional Conduct does not mean that lawyers no longer have to avoid the appearance of impropriety. First Am. Carriers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990).

Associations.

The law firm which represented the wife in a proceeding to enforce the alimony provision of a divorce decree would be disqualified where a partner in the law firm was a former associate of an attorney who represented the husband in the divorce proceeding. Norman v. Norman, 333 Ark. 644, 970 S.W.2d 270 (1998).

Duty of Counsel.

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582 (1990).

Substantially Related Matter.

Probate judge did not err in denying administratrix's motion to disqualify attorney for

the estate based on fact that he had previously represented administratrix in highway condemnation suit, since highway condemnation suit was not the same or substantially related to determination of heirship at issue. Cobb v. Estate of Keown, 53 Ark. App. 171, 920 S.W.2d 501 (1996).

Court did not err by denying defendant's motion to reverse his convictions and vacate his sentences on the basis that two prosecutors represented him in previous criminal matters because defendant failed to allege or prove that his case involved the same or a substantially related matter as the matters in which the prosecutors previously represented him; the mere fact that the current case was a criminal case and that the prior representations also involved criminal matters did not establish that the cases involved the same or a substantially related matter. Avery v. State, 93 Ark. App. 112, 217 S.W.3d 162 (2005).

Waiver.

There cannot be any waiver by former client in the absence of advice of the existence of, and the legal implications arising from, potential conflict of interest. Martindale v. Richmond, 301 Ark. 167, 782 S.W.2d 582 (1990).

Cited: Womack v. First State Bank, 21 Ark. App. 33, 728 S.W.2d 194 (1987); Burnette v. Morgan, 303 Ark. 150, 794 S.W.2d 145 (1990); Dawan v. Lockhart, 980 F.2d 470 (8th Cir. 1992), criticized Harris v. Norris, 864 F. Supp. 96 (E.D. Ark. 1994).

Rule 1.10. Imputation of conflicts of interest: general rule.

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9 or 3.7, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm,

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

COMMENT**Definition of "Firm"**

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]-[4].

Principles of Imputed Disqualification

[2] The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b).

[3] The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and the personal beliefs of the lawyer will not materially limit the rep-

resentation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

[4] The rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

[5] Rule 1.10(b) operates to permit a law firm, under certain circumstances, to represent a person with interests directly adverse to those of a client represented by a lawyer who formerly was associated with the firm. The Rule applies regardless of when the formerly associated lawyer represented the client. However, the law firm may not represent a person with interests adverse to those of a present client of the firm, which would violate Rule 1.7. Moreover, the firm may not represent the person where the matter is the same or substantially related to that in which the

formerly associated lawyer represented the client and any other lawyer currently in the firm has material information protected by Rules 1.6 and 1.9(c).

[6] Rule 1.10(c) removes imputation with the informed consent of the affected client or former client under the conditions stated in Rule 1.7. The conditions stated in Rule 1.7 require the lawyer to determine that the representation is not prohibited by Rule 1.7(b) and that each affected client or former client has given informed consent to the representation, confirmed in writing. In some cases, the risk may be so severe that the conflict may not be cured by client consent. For a discussion of the effectiveness of client waivers of conflicts that might arise in the future, see Rule 1.7, Comment [22]. For a definition of informed consent, see Rule 1.0(e).

[7] Where a lawyer has joined a private firm

after having represented the government, imputation is governed by Rule 1.11 (b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients, in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

[8] Where a lawyer is prohibited from engaging in certain transactions under Rule 1.8, paragraph (k) of that Rule, and not this Rule, determines whether that prohibition also applies to other lawyers associated in a firm with the personally prohibited lawyer.

[9] The duty to avoid the appearance of impropriety discussed in Comment [37] to Rule 1.7 is likewise applicable to Rule 1.9 and Rule 1.10.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 5-105(D) provided that “[i]f a lawyer is required to decline or to withdraw from employment under a Disciplinary Rule, no part-

ner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.”

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Morgan, Screening the Disqualified Lawyer, etc., 10 U. Ark. Little Rock L.J. 37.

Note, Attorney and Client — Conflict of Interest — Prohibition Against Appearance of Impropriety Retained Under Model Rules of Professional Conduct. First American Carri-

ers, Inc. v. Kroger Co., 302 Ark. 86, 787 S.W.2d 669 (1990), 13 U. Ark. Little Rock L.J. 271.

Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Survey, Attorney and Client, 14 U. Ark. Little Rock L.J. 257.

CASE NOTES

ANALYSIS

Purpose.

Burden of proof.

Illustrative cases.

Presumption of disqualification.

Purpose.

Disqualification is an absolutely necessary measure to protect and preserve the integrity of the attorney-client relationship; yet it is a drastic measure to be imposed only where clearly required by the circumstances. *Burnette v. Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990).

Burden of Proof.

When disqualification is sought, the burden of proving not only a lack of knowledge but also a lack of access to information should rest with the challenged attorney alleged to be disqualified. *Burnette v. Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990).

Illustrative Cases.

Where appellant subpoenaed appellee's attorney, claiming his testimony was central to the issues in the case, and then moved to disqualify the attorney and his firm under this rule and Ark. Model R. Prof. Conduct 3.7, as the motion was filed less than two weeks before trial, the trial court did not abuse its discretion in denying it, as disqualification would have worked a great injustice on appellee and forced a lengthy postponement of the trial. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d —, 2011 Ark. App. LEXIS 390 (May 11, 2011).

Presumption of Disqualification.

Where a firm has previously represented a party, gaining in the process confidential information, a rebuttable presumption arises, which charges other members of the firm with knowledge and thus disqualifies all members

in subsequent representation in the same or similar matters where such knowledge would compromise the former client's rights, only when the attorney involved actually has knowledge acquired during the former associ-

ation. *Burnette v. Morgan*, 303 Ark. 150, 794 S.W.2d 145 (1990).

Cited: *First Am. Carriers, Inc. v. Kroger Co.*, 302 Ark. 86, 787 S.W.2d 669 (1990).

Rule 1.11. Successive government and private employment.

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless; the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, unless the lawyer has the consent, confirmed in writing, of the appropriate government supervisor or official. A lawyer serving as a law clerk to a judge or other adjudicative officer is subject to Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

COMMENT

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflict of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(e) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) apply regardless of whether a lawyer is adverse to a former client and are thus designed not only to protect the former client, but also to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of

the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. Thus a former government lawyer is disqualified only from particular matters in which the lawyer participated personally and substantially. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(k) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation

directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

CODE COMPARISON PRIOR TO 2005 REVISION

Rule 1.11(a) is similar to DR 9-101(B), except that the latter uses the terms "in which he had substantial responsibility while he was a public employee."

Rules 1.11(b), (c), (d) and (e) have no counterparts in the Code.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Morgan, Screening the Disqualified Lawyer, etc., 10 U. Ark. Little Rock L.J. 37.

Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

CASE NOTES

Substantially Related Matter.

Court did not err by denying defendant's motion to reverse his convictions and vacate his sentences on the basis that two prosecutors represented him in previous criminal matters because defendant failed to allege or prove that his case involved the same or a substantially related matter as the matters in

which the prosecutors previously represented him; the mere fact that the current case was a criminal case and that the prior representations also involved criminal matters did not establish that the cases involved the same or a substantially related matter. *Avery v. State*, 93 Ark. App. 112, 217 S.W.3d 162 (2005).

Rule 1.12. Former judge, arbitrator, mediator or other third-party neutral.

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent, confirmed in writing.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, or as an arbitrator, mediator or other third party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with the provisions of this rule.

(d) An arbitrator selected as a partisan of a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

COMMENT

[1] This Rule generally parallels Rule 1.11. The term “personally and substantially” signifies that a judge who was a member of a multimember court, and thereafter left judicial office to practice law, is not prohibited from representing a client in a matter pending in the court, but in which the former judge did not participate. So also the fact that a former judge exercised administrative responsibility in a court does not prevent the former judge from acting as a lawyer in a matter where the judge had previously exercised remote or incidental administrative responsibility that did not affect the merits. Compare the Comment to Rule 1.11. The term “adjudicative officer” includes such officials as judges pro tempore, referees, special masters, hearing officers and other parajudicial officers, and also lawyers who serve as part-time judges. Compliance Canons A(2), B(2) and C of the Model Code of Judicial Conduct provide that a part-time judge, judge pro tempore or retired judge recalled to active service, may not “act as a lawyer in any proceeding in which he served as a judge or in any other proceeding related thereto.” Although phrased differently from this Rule, those Rules correspond in meaning.

[2] Like former judges, lawyers who have served as arbitrators, mediators or other third-party neutrals may be asked to represent a client in a matter in which the lawyer

participated personally and substantially. This Rule forbids such representation unless all of the parties to the proceedings give their informed consent, confirmed in writing. See Rule 1.0(e) and (b). Other law or codes of ethics governing third-party neutrals may impose more stringent standards of personal or imputed disqualification. See Rule 2.4.

[3] Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6, they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals. Thus, paragraph (c) provides that conflicts of the personally disqualified lawyer will be imputed to other lawyers in a law firm unless the conditions of this paragraph are met.

[4] Requirements for screening procedures are stated in Rule 1.0(k). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[5] Notice, including a description of the screened lawyer’s prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

CODE COMPARISON PRIOR TO 2005 REVISION

Paragraph (a) is substantially similar to DR 9-101(A), which provides that “A lawyer shall not accept employment in a matter upon the merits of which he has acted in a judicial capacity.” Paragraph (a) differs, however, in that it is broader in scope and states more specifically the persons to whom it applies. There is no counterpart in the Code to paragraphs (b), (c) or (d).

With regard to arbitrators, EC 5-20 states that “a lawyer who has undertaken to act as an impartial arbitrator or mediator ... should not thereafter represent in the dispute any of the parties involved.” DR 9-101(A) does not provide a waiver of the disqualification applied to former judges by consent of the parties. However, DR 5-105(C) is similar in effect and could be construed to permit waiver.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Rule 1.13. Organization as client.

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b), the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT**The Entity as the Client**

[1] An organizational client is a legal entity,

but it cannot act except through its officers, directors, employees, shareholders and other

constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequence, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not

require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rule 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 6.1(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(2)-(6). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation to the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such

circumstances, Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in Paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization against a claim arising out of an alleged violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

[8] A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these Paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal, and what the lawyer reasonably believes to be the basis for his or her discharge or withdrawal.

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the

government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Paragraph (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to this Rule in the disciplinary Rules of the Code. EC 5-18 states

that "A lawyer employed or retained by a corporation or similar entity owes his alle-

giance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally, a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent him in an individual capacity; in such a case the lawyer may serve the individual only if the

lawyer is convinced that differing interests are not present." EC 5-24 states "although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman." DR 5-107(B) provides that "a lawyer shall not permit a person who ... employs ... him to render legal services for another to direct or regulate his professional judgment in rendering such legal services."

RESEARCH REFERENCES

Ark. L. Rev. The Ethics of Communicating with an Organization's Employees: An Analysis of the Unworkable "Hybrid" or "Multifac-

tor" Managing-Speaking Agent, ABA, and Niesig Tests and a Proposal for a "Supervisor" Standard, 45 Ark. L. Rev. 801.

CASE NOTES

Privileged Communications.

Directors of a defendant corporation could assert attorney-corporate client privilege against plaintiff, despite plaintiff's former status as a director of the corporation. In re Hutchins, 216 B.R. 11 (Bankr. E.D. Ark. 1997).

This rule governs attorneys' relations with their organizational clients and imposes par-

ticular duties upon the attorneys; the organization's right to exclude an individual "authorized constituent" from representation by the corporation's attorney is a matter for the state law governing such entities—not the rules of professional conduct governing attorneys. In re Hutchins, 216 B.R. 11 (Bankr. E.D. Ark. 1997).

Rule 1.14. Client with diminished capacity.

(a) When a client's ability to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take actions to protect the client, and in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian. Extreme caution must be exercised by a lawyer before nominating the lawyer, a member or employee of the lawyer's firm, or a relative within the third degree or relationship to serve as guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

COMMENT

[1] The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

[2] The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

[3] The client may wish to have family members or other persons participate in discussions with the lawyer. When necessary to assist in the representation, the presence of such persons generally does not affect the applicability of the attorney-client evidentiary privilege. Nevertheless, the lawyer must keep the client's interests foremost and, except for protective action authorized under paragraph (b), must look to the client, and not family members, to make decisions on the client's behalf.

[4] If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client. In matters involving a minor, whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor. If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d).

Taking Protective Action

[5] If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship can

not be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary. Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.

[6] In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician.

[7] If a legal representative has not been appointed, the lawyer should consider whether appointment of a guardian ad litem, conservator or guardian is necessary to protect the client's interests. Thus, if a client with diminished capacity has substantial property that should be sold for the client's benefit, effective completion of the transaction may require appointment of a legal representative. In addition, rules of procedure in litigation sometimes provide that minors or persons with diminished capacity must be represented by a guardian or next friend if they do not have a general guardian. In many circumstances, however, appointment of a legal representative may be more expensive or traumatic for the client than circumstances in fact require. Evaluation of such circumstances is a matter entrusted to the professional judgment of the lawyer. In considering alternatives, however, the lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client.

Disclosure of the Client's Condition

[8] Disclosure of the client's diminished

capacity could adversely affect the client's interests. For example, raising the question of diminished capacity could, in some circumstances, lead to proceedings for involuntary commitment. Information relating to the representation is protected by Rule 1.6. Therefore, unless authorized to do so, the lawyer may not disclose such information. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized to make the necessary disclosures, even when the client directs the lawyer to the contrary. Nevertheless, given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one.

Emergency Legal Assistance

[9] In an emergency where the health, safety or a financial interest of a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to

establish a client-lawyer relationship or to make or express considered judgments about the matter, when the person or another acting in good faith on that person's behalf has consulted with the lawyer. Even in such an emergency, however, the lawyer should not act unless the lawyer reasonably believes that the person has no other lawyer, agent or other representative available. The lawyer should take legal action on behalf of the person only to the extent reasonably necessary to maintain the status quo or otherwise avoid imminent and irreparable harm. A lawyer who undertakes to represent a person in such an exigent situation has the same duties under these Rules as the lawyer would with respect to a client.

[10] A lawyer who acts on behalf of a person with seriously diminished capacity in an emergency should keep the confidences of the person as if dealing with a client, disclosing them only to the extent necessary to accomplish the intended protective action. The lawyer should disclose to any tribunal involved and to any other counsel involved the nature of his or her relationship with the person. The lawyer should take steps to regularize the relationship or implement other protective solutions as soon as possible. Normally, a lawyer would not seek compensation for such emergency actions taken.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to this Rule in the Disciplinary Rules of the Code. EC 7-12 states that "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of

contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent."

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, Ethical Issues in Representing Clients with Diminished Capacity, 2003 Ark. L. Notes 57.

Rule 1.15. Safekeeping property and trust accounts.

(a) Safekeeping property.

(1) A lawyer shall hold property of clients or third persons, including prospective clients, that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.

(2) Property, other than funds of clients or third persons, shall be identified as such and appropriately safeguarded.

(3) Complete records of trust account funds and other property shall be kept by the lawyer and shall be preserved for a period of five years after the termination of the representation or the last contact with a prospective client.

(4) A lawyer shall maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any record keeping rules established by law, rule, or court order.

(5) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person in writing. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full written accounting regarding such property to the client or third persons.

(6) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

(b) *Trust Accounts: IOLTA trust accounts and non-IOLTA trust accounts.*

(1) Funds of a client shall be deposited and maintained in one or more separate, clearly identifiable trust accounts in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person.

(2) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(3) A lawyer may deposit funds belonging to the lawyer or the law firm in a client trust account for the sole purposes of paying bank services charges on that account, or to comply with the minimum balance required for the waiver of bank charges, but only in the amount necessary for those purposes, but not to exceed \$500.00 in any case. Such funds belonging to the lawyer or law firm shall be clearly identified as such in the account records.

(4) Each trust account referred to in section (b)(1) shall be an interest- or dividend bearing account held at an eligible institution.

(5) Each such trust account shall provide overdraft notification to the Executive Director of the Office of Professional Conduct for the purpose of reporting whenever any properly payable instrument is presented against a lawyer trust account containing insufficient funds, irrespective of whether or not the instrument is honored. The financial institution shall report simultaneously with its notice to the lawyer the following information:

(i) In the case of a dishonored instrument, the report shall be identical to the overdraft notice customarily forwarded to the depositor, and should include a copy of the dishonored instrument, if such a copy is normally provided to depositors;

(ii) In the case of instruments that are presented against insufficient funds but which instruments are honored, the report shall identify the

financial institution, the lawyer or law firm, the account number, the date of presentation for payment, and the date paid, as well as the amount of overdraft created thereby.

(6) A lawyer who receives client funds which, in the judgment of the lawyer, are nominal in amount, or are expected to be held for such a short period of time that it is not practical to earn and account for income on individual deposits, shall create and maintain an interest-bearing, multi-client trust account ("IOLTA" account) for such funds. The account shall be maintained in compliance with the following requirements:

(i) The trust account shall be maintained in compliance with sections (b)(1)-(b)(5) of this Rule and the funds shall be subject to withdrawal upon request and without delay;

(ii) No earnings from the account shall be made available to the lawyer or law firm; and,

(iii) The interest accruing on this account, net of allowable reasonable fees, shall be paid to the Arkansas IOLTA Foundation, Inc. All other fees and transaction costs shall be paid by the lawyer or law firm.

(7) All client funds shall be deposited in the account specified in section (b)(6), unless they are deposited in a separate interest-bearing account ("non-IOLTA" account) for a specific and individual matter for a particular client. There shall be a separate account opened for each such particular client matter. Interest so earned must be held in trust as property of each client in the same manner as is provided in this Rule.

(8) The decision whether to use an "IOLTA" account specified in section (b)(6) or a "non-IOLTA" account specified in section (b)(7) is within the discretion of the lawyer. In making this determination, consideration should be given to the following:

(i) The amount of interest which the funds would earn during the period they are expected to be deposited; and,

(ii) The cost of establishing and administering the account, including the cost of the lawyer's or law firm's services.

(9) Every lawyer practicing or admitted to practice in this State shall, as a condition thereof, be conclusively deemed to have consented to the reporting requirements mandated by this rule. All lawyers shall certify annually that they, their law firm or professional corporation is in compliance with all sections and subsections of this Rule.

(10) A lawyer shall certify, in connection with the annual renewal of the lawyer's license, that the lawyer is complying with all provisions of this rule. Certification shall be made on a form provided by and in a manner designated by the Clerk of the Supreme Court.

(11) A lawyer or a law firm may be exempt from the requirements of this rule if the Arkansas IOLTA Foundation's Board of Directors, on its own motion, has exempted the lawyer or law firm from participation in the Program for a period of no more than two years when service charges on the lawyer's or law firm's trust account equal or exceed any interest generated.

(c) IOLTA Foundation relationship with eligible and member institutions.

(1) DEFINITIONS. As used in this rule, the terms below shall have the following meaning:

(i) "IOLTA account" means an interest- or dividend-bearing trust account benefiting the Arkansas IOLTA Foundation, Inc. established in an eligible

institution for the deposit of nominal or short-term funds of clients or third persons, which may be withdrawn upon request as soon as permitted by law.

(ii) "Eligible institution" for IOLTA accounts means a depository bank or savings and loan association or credit union authorized by federal or state laws to do business in Arkansas, whose deposits are insured by an agency of the federal government, or any open-end investment company registered with the Securities and Exchange Commission and authorized by federal or state laws to do business in Arkansas. In addition, an eligible institution must either (1) maintain a physical office in the state of Arkansas or (2) be owned by a bank holding company regulated by the Federal Reserve System, of which a subsidiary federally-insured depository bank or savings and loan association or credit union maintains a physical office in the state of Arkansas. Eligible institutions must meet the requirements set out in section (b) above.

(iii) "Interest- or dividend-bearing trust account" means a federally insured checking account or an investment product, including a sweep product and a daily (overnight) financial-institution repurchase agreement or an open-end money market fund. A daily financial-institution repurchase agreement must be fully collateralized by U.S. Treasury Securities; an open-end money-market fund must invest primarily in U.S. Treasury Securities or repurchase agreements fully collateralized by U.S. Treasury Securities. A daily financial-institution repurchase agreement may be established only with an eligible institution that is "well capitalized" or "adequately capitalized" as those terms are defined by applicable federal statutes and regulations. An open-end money-market fund must hold itself out as a money-market fund as defined by applicable federal statutes and regulations under the Investment Company Act of 1940 and, at the time of investment, have total managed assets of at least \$250,000,000. The funds covered by this rule shall be subject to withdrawal upon request and without delay.

(iv) "Allowable reasonable fees" means: (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balance, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee.

(v) "U.S. Treasury Securities" means direct obligations of the federal government of the United States.

(vi) "Repurchase agreements" means transactions in which a fund buys a security from a dealer or bank and agrees to sell the security back at a mutually agreed upon time and price. The repurchase price exceeds the sale price, reflecting the fund's return on the transaction. This return is unrelated to the interest rate on the underlying security. Repurchase agreements are subject to credit risks.

(2) Participation in the IOLTA program is voluntary for banks, savings and loan associations, and investment companies. Any eligible institution that elects to provide and maintain IOLTA accounts shall do so according to the following terms:

(i) Determination of Interest Rates and Dividends. Eligible institutions that maintain IOLTA accounts that are, or are invested in, interest-bearing deposits or daily financial-institution repurchase agreements shall pay no less than the highest rate and dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other eligibility qualifications, if

any. In determining the highest rate or dividend generally available from the institution to its non-IOLTA accounts, eligible institutions may consider factors, in addition to the balance in the IOLTA account, customarily considered by the institution when setting interest rates or dividends for its customers, provided that such factors do not discriminate between IOLTA accounts and accounts of non-IOLTA customers, and that these factors do not include the fact that the account is an IOLTA account. The eligible institution may offer, and the lawyer may accept, a sweep account that provides a mechanism for the overnight investment of balances in the IOLTA account into a daily financial institution repurchase agreement or a money-market fund. However, this Rule shall not require any eligible institution to offer or otherwise make available sweep accounts for IOLTA accounts.

(ii) Written Agreements. There shall be a written agreement between the lawyer and the eligible institution, designating interest on the IOLTA account be remitted to the Arkansas IOLTA Foundation, Inc. on a monthly basis.

(iii) Interest Rates and Dividends. Eligible institutions shall maintain IOLTA accounts that pay the highest interest rate or dividend generally available from the institution to its non-IOLTA account customers when IOLTA accounts meet or exceed the same minimum balance or other account eligibility qualifications, if any.

(iv) Reasonable Fees. Reasonable fees means (1) per check charges, (2) per deposit charges, (3) a fee in lieu of minimum balances, (4) federal deposit insurance fees, (5) sweep fees, 12b-1 fees, and subaccounting fees, and (6) a reasonable IOLTA account administrative fee. Reasonable fees are the only service charges or fees permitted to be deducted from interest earned on IOLTA accounts. Reasonable fees may be deducted from interest on an IOLTA account only at such rates and under such circumstances as is the eligible institution's customary practice for all of its customers with interest-bearing accounts. All other fees and charges shall not be assessed against the accrued interest on the IOLTA account but rather shall be the responsibility of, and may be charged to, the lawyer maintaining the IOLTA account.

(v) Negative Netting Prohibited. Fees or charges in excess of the interest earned on the account for any month shall not be taken from interest earned on other IOLTA accounts or from the principal of the account.

(vi) Reporting Requirements. A statement should be transmitted monthly to the Arkansas IOLTA Foundation, Inc. with each remittance showing the period for which the remittance is made, the name of the lawyer or law firm from whose IOLTA account the remittance is being sent, the IOLTA account number, the average daily rate applied, the gross interest or dividend earned during the period, the amount and description of any service charges or fees assessed during the remittance period, and the net amount of interest or dividend remitted for the period. The Foundation supplies a monthly remittance form tailored to each bank listing the required information; however, should the bank elect to generate its own report, the requirements in this section must be addressed.

(3) In addition to the attorney trust account "automatic overdraft" notification procedures set out in Section 28 of the Procedures of the Arkansas Supreme Court regulating professional conduct of attorneys at law:

(i) Banks may only be removed from the IOLTA program after notice from the Foundation to the bank of the action needed to correct or implement any needed changes and a timely response from the bank.

(ii) Should a bank be removed from the IOLTA program, the Foundation will give attorneys sufficient notice and time in order to move their IOLTA accounts to another participating bank. (Amended January 1, 2007; amended February 1, 2007.)

Publisher's Notes. The Per Curiam of the Arkansas Supreme Court of December 20, 1993, provided, in part: "Having now thoroughly considered the matter, the Court directs that henceforth when paying the annual Arkansas Supreme Court license renewal fee, an attorney shall certify that he or she has complied with and will continue to comply with all ethical rules concerning the maintenance of a trust account into which a client's funds or those funds in which a client may have an interest will be deposited pending

proper disposition of said funds.

"Further, willful failure to provide said certification shall constitute grounds for discipline under the provisions of Section 1 of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law."

Cross References. Attorney trust account and automatic "overdraft" notification procedure, Section 28 of Procedures of the Arkansas Supreme Court Regulating Professional Conduct of Attorneys at Law.

COMMENT

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b)(3) provides it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the trust account funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fee owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed of the funds shall be promptly distributed.

[4] Paragraph (a)(6) also recognizes that third parties may have lawful claims against

specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third party claim is not frivolous under applicable law, the lawyer must refuse to surrender property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 1.15(a), DR 9-102(A) provides that “funds of clients” are to be kept in a trust account in the state in which the lawyer’s office is situated. DR 9-102(B)(2) provides that a lawyer shall “identify and label securities and properties of a client ... and place them in ... safekeeping ...” DR 9-102(B)(3) requires that a lawyer “maintain complete records of all funds, securities and other properties of a client ...” Rule 1.15(a)

extends these requirements to property of a third person that is in the lawyer’s possession in connection with the representation.

Rule 1.15(b) is substantially similar to DR 9-102(B)(1) and (4).

Rule 1.15(c) is substantially similar to DR 9-102(A)(2), except that the requirement regarding disputes applies to property concerning which an interest is claimed by a third person as well as by a client.

RESEARCH REFERENCES

Ark. L. Rev. Note, *Liteky v. United States: The Extrajudicial Source Doctrine and Its Implications for Judicial Disqualification*, 48 Ark. L. Rev. 1059.

U. Ark. Little Rock L.J. DiPippa, *Lawyers, Clients, and Money*, 18 U. Ark. Little Rock L.J. 95.

CASE NOTES

Client Funds.

A judge violate the rule when he deposited client funds in a personal account rather than an identifiable trust account. *Judicial Discipline & Disability Comm’n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

Confused nature of attorney’s records did not permit one to fully understand what activity was occurring in his trust account and, therefore, the Arkansas Committee on Professional Conduct Panel’s decision that the attorney did not violate subsection (a) of this rule was not clearly erroneous. *Comm. on Prof’l Conduct v. Revels*, 360 Ark. 69, 199 S.W.3d 630 (2004).

Attorney was disbarred for misconduct

where (1) he applied a \$2600 client payment to his fee rather than the payment of court costs, (2) another client gave the attorney a \$500 check that the attorney cashed without reporting it to his firm, (3) the attorney’s secretary prepared a \$1,000 check made payable to a car dealership and a \$500 check made payable to the client, and the attorney signed the client’s name to the check and cashed it, and (4) when contacted by a client about a missing \$500 in restitution, the firm sent the client a check from the firm’s trust account for \$1,500, but the firm’s trust account was then overdrawn by \$500. *Ligon v. Newman*, 365 Ark. 510, 231 S.W.3d 662 (2006).

Rule 1.16. Declining or terminating representation.

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if;

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer’s services to perpetrate a crime or fraud;

(4) a client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

COMMENT

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as

sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that

the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client

refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. See Rule 1.15.

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, Changing Firms or Offices: Doing it Right, 2002 Ark. L. Notes 39.

Ark. L. Rev. Note, Henry, Walden & Davis v. Goodman: The Value of a Discharged Attorney's Contingent Fee Contract in Arkansas, 42 Ark. L. Rev. 549.

U. Ark. Little Rock L.J. Dudley, The Continuous Representation Doctrine: Must You Sue Your Lawyer While She Still Represents You?, 19 U. Ark. Little Rock L.J. 241.

CASE NOTES

ANALYSIS

Attorney's fees.

Disqualification of judge.

Sanction.

Termination of representation.

Attorney's Fees.

When a client discharges his attorney, he is bound to pay discharged attorney a reasonable fee for services rendered. Henry, Walden & Davis v. Goodman, 294 Ark. 25, 741 S.W.2d 233 (1987), questioned Lockley v. Easley, 302 Ark. 13, 786 S.W.2d 573 (1990).

Disqualification of Judge.

Where the circuit court suspected judge shopping and heard testimony, it concluded that the citizen retained the attorney to force recusal; although the citizen concluded that he would be better served by a judge other than the circuit court judge, the desire for a different judge did not support disqualification of a judge. Valley v. Phillips County Election Comm'n, 357 Ark. 494, 183 S.W.3d 557 (2004).

Sanction.

Sanction for failing to take steps to the extent reasonably practicable to protect client's interests upon termination of representation was upheld. Arens v. Committee on Professional Conduct, 307 Ark. 308, 820 S.W.2d 263 (1991).

Termination of Representation.

There was a "termination of representation" within the meaning of the rule, notwithstanding the appellant attorney's claim that

he limited his involvement to an investigation of facts to determine whether he would be willing to take a case, where there was evidence that the attorney did not continue to work on the case because he thought his client owed him an additional retainer. Cortinez v. Supreme Court Comm., 332 Ark. 456, 966 S.W.2d 251 (1998).

Appellate court would not consider a claim that a trial court erred in denying the claimant's motion to proceed in a civil action on a pro se basis where he had discharged his attorney because the claimant was not happy with the way the attorney was handling the case, and in allowing the attorney to later sign and submit a motion to dismiss the case based on a settlement; claimant had not presented a record of any proceeding in the trial court that would allow a proper review of the claim, nor had the claimant presented any authority in support of his argument that ARCP 64 and this rule gave the claimant an absolute right to discharge his attorney without the permission of the trial court. Holcombe v. Marts, 352 Ark. 201, 99 S.W.3d 401 (2003).

Attorney was properly found to have violated subsection (d) of this rule because the attorney failed to provide a former client with the documents from the client's file upon request; even though the attorney claimed that the client had received duplicates of documents filed during the representation, it was not the client's duty to maintain a file on the client's own behalf. Travis v. Supreme Court Comm. on Prof'l Conduct, 2009 Ark. 188, 306 S.W.3d 3 (2009).

Subsection (d) of this rule places an affirmative duty on an attorney, not a client, to protect the client's interests upon termination of representation. *Travis v. Supreme Court Comm. on Prof'l Conduct*, 2009 Ark. 188, 306 S.W.3d 3 (2009).

The plain language of subsection (d) of this rule places a duty on an attorney to surrender the papers and property to which a client is

entitled upon termination of representation irrespective of negligent conduct or the fact that the representation has been completed. *Travis v. Supreme Court Comm. on Prof'l Conduct*, 2009 Ark. 188, 306 S.W.3d 3 (2009).

Cited: *In re Robinson*, 373 B.R. 612 (Bankr. E.D. Ark. 2007), *aff'd* 557 F.3d 593 (8th Cir. 2009).

Rule 1.17. Sale of law practice.

A lawyer or a law firm may sell or purchase a law practice, or an area of law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law, or in the area of practice that has been sold, in the State in which the practice has been conducted;

(b) The practice, or the entire area of practice, is sold to one or more lawyers or law firms;

(c) The seller gives written notice to each of the seller's clients regarding:

(1) the proposed sale;

(2) the client's right to retain other counsel or to take possession of the file; and,

(3) the fact that the client's consent to the sale will be presumed if the client does not take any action or does not otherwise object within ninety (90) days of receipt of the notice.

If a client cannot be given notice, the representation of that client may be transferred to the purchaser only upon entry of an order so authorizing by the court having jurisdiction. The seller may disclose to the court in camera information relating to the representation only to the extent necessary to obtain an order authorizing the transfer of a file.

(d) The fees charged clients shall not be increased by reason of the sale.

(e) In every instance in which a law practice in its entirety is sold, the selling attorney, or the legal representative thereof, in the case of a deceased, disabled or disappeared attorney, shall within twenty (20) days of the completion of the sale, file an affidavit with the Committee on Professional Conduct that he or she has complied with the requirements of notice contained within this provision, to include proof of publication, along with a list of clients so notified and an exemplar of such notice. Such affidavit shall also contain the address where communications may thereafter be directed to the affiant.

COMMENT

[1] The practice of law is a profession, not merely a business. Clients are not commodities that can be purchased and sold at will. Pursuant to this Rule, when a lawyer or an entire firm ceases to practice, or ceases to practice in an area of law, and other lawyers or firms take over the representation, the selling lawyer or firm may obtain compensation for the reasonable value of the practice as may withdrawing partners of law firms. See Rules 5.4 and 5.6.

Termination of Practice by the Seller

[2] The requirement that all of the private

practice, or all of an area of practice, be sold is satisfied if the seller in good faith makes the entire practice, or the area of practice, available for sale to the purchasers. The fact that a number of the seller's clients decide not to be represented by the purchasers but take their matters elsewhere, therefore, does not result in a violation. Return to private practice as a result of an unanticipated change in circumstances does not necessarily result in a violation. For example, a lawyer who has sold the practice to accept an appointment to judicial office does not violate the requirement that

the sale be attendant to cessation of practice if the lawyer later resumes private practice upon being defeated in a contested or a retention election for the office or resigns from a judiciary position.

[3] The requirement that the seller cease to engage in the private practice of law does not prohibit employment as a lawyer on the staff of a public agency or a legal services entity that provides legal services to the poor, or as in-house counsel to a business.

[4] The Rule permits a sale of an entire practice attendant upon retirement from the private practice of law within the jurisdiction. Its provisions, therefore, accommodate the lawyer who sells the practice upon the occasion of moving to another state.

[5] This Rule also permits a lawyer or law firm to sell an area of practice. If an area of practice is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter in connection with the division of a fee with another lawyer as would otherwise be permitted by Rule 1.5(e). For example, a lawyer with a substantial number of estate planning matters and a substantial number of probate administration cases may sell the estate planning portion of the practice but remain in the practice of law by concentrating on probate administration; however, that practitioner may not thereafter accept any estate planning matters. Although a lawyer who leaves a jurisdiction or geographical area typically would sell the entire practice, this Rule permits the lawyer to limit the sale to one or more areas of the practice, thereby preserving the lawyer's right to continue practice in the areas of the practice that were not sold.

Sale of Entire Practice or Entire Area of Practice

[6] The Rule requires that the seller's entire practice, or an entire area of practice, be sold. The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee-generating matters. The purchasers are required to undertake all client matters in the practice or practice area, subject to client consent. This requirement is satisfied, however, even if a purchaser is unable to undertake a particular client matter because of a conflict of interest.

Client Confidences, Consent and Notice

[7] Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the

confidentiality provisions of Model Rule 1.6 than do preliminary discussions concerning the possible association of another lawyer or mergers between firms, with respect to which client consent is not required. Providing the purchaser access to client-specific information relating to the representation and to the file, however, requires client consent. The Rule provides that before such information can be disclosed by the seller to the purchaser the client must be given actual written notice of the contemplated sale, including the identity of the purchaser and must be told that the decision to consent or make other arrangements must be made within 90 days. If nothing is heard from the client within that time, consent to the sale is presumed.

[8] A lawyer or law firm ceasing to practice cannot be required to remain in practice because some clients cannot be given actual notice of the proposed purchase. Since these clients cannot themselves consent to the purchase or direct any other disposition of their files, the Rule requires an order from a court having jurisdiction authorizing their transfer or other disposition. The Court can be expected to determine whether reasonable efforts to locate the client have been exhausted, and whether the absent client's legitimate interests will be served by authorizing the transfer of the file so that the purchaser may continue the representation. Preservation of client confidences requires that the petition for a court order be considered *in camera*.

[9] All the elements of client autonomy, including the client's absolute right to discharge a lawyer and transfer the representation to another, survive the sale of the practice or area of practice.

Fee Arrangements Between Client and Purchaser

[10] The sale may not be financed by increases in fees charged the clients of the practice. Existing agreements between the seller and the client as to fees and the scope of the work must be honored by the purchaser.

Other Applicable Ethical Standards

[11] Lawyers participating in the sale of a law practice or a practice area are subject to the ethical standards applicable to involving another lawyer in the representation of a client. These include, for example, the seller's obligation to exercise competence in identifying a purchaser qualified to assume the practice and the purchaser's obligation to undertake the representation competently (see Rule 1.1); the obligation to avoid disqualifying conflicts, and to secure the client's informed consent for those conflicts that can be agreed to (see Rule 1.7 regarding conflicts and Rule 1.0(e) for the definition of informed consent);

and the obligation to protect information relating to the representation (see Rules 1.6 and 1.9).

[12] If approval of the substitution of the purchasing lawyer for the selling lawyer is required by the rules of any tribunal in which a matter is pending, such approval must be obtained before the matter can be included in the sale (see Rule 1.16).

Applicability of the Rule

[13] This Rule applies to the sale of a law practice by representatives of a deceased, disabled or disappeared lawyer. Thus, the seller may be represented by a non-lawyer representative not subject to these Rules.

Since, however, no lawyer may participate in a sale of a law practice which does not conform to the requirements of this Rule, the representatives of the seller as well as the purchasing lawyer can be expected to see to it that they are met.

[14] Admission to or retirement from a law partnership or professional association, retirement plans and similar arrangements, and a sale of tangible assets of a law practice, do not constitute a sale or purchase governed by this Rule.

[15] This Rule does not apply to the transfers of legal representation between lawyers when such transfers are unrelated to the sale of a practice or an area of practice.

Rule 1.18. Duties to prospective client.

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

COMMENT

[1] Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's discussions with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

[2] Not all persons who communicate infor-

mation to a lawyer are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of paragraph (a).

[3] It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer

relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

[4] In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.

[5] A lawyer may condition conversations with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[6] Even in the absence of an agreement,

under paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter.

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

[8] Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

[9] For the duty of competence of a lawyer who gives assistance on the merits of a matter to a prospective client, see Rule 1.1. For a lawyer's duties when a prospective client entrusts valuables or papers to the lawyer's care, see Rule 1.15.

RESEARCH REFERENCES

U. Ark. Little Rock L. Rev. Annual Survey of Case Law: Practice, Procedure, and

Courts, 29 U. Ark. Little Rock L. Rev. 905.

COUNSELOR

Rule 2.1. Advisor.

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

COMMENT

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice,

a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

[4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting pro-

fession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no direct counterpart to Rule 2.1 in the Disciplinary Rules of the Code. DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." EC 7-8 states that "Advice of a lawyer to his client need not be confined to purely legal

considerations ... In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible ... In the final analysis, however ... the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client"

CASE NOTES

Cited: *Drayton v. State*, 23 Ark. App. 1, 740 S.W.2d 147 (1987).

Rule 2.2. Reserved.

Rule 2.3. Evaluation for use by third persons.

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.

COMMENT

Definition

[1] An evaluation may be performed at the client's direction or when impliedly authorized in order to carry out the representation. See Rule 1.2. Such an evaluation may be for the primary purpose of establishing information for the benefit of third parties; for example, an opinion concerning the title of property rendered at the behest of a vendor for the information of a prospective purchaser, or at the behest of a borrower for the information of a prospective lender. In some situations, the evaluation may be required by a government agency; for example, an opinion concerning the legality of the securities registered for sale under the securities laws. In other instances, the evaluation may be required by a third person, such as a purchaser of a business.

[2] A legal evaluation should be distinguished from an investigation of a person with whom the lawyer does not have a client-lawyer relationship. For example, a lawyer retained by a purchaser to analyze a vendor's title to property does not have a client-lawyer relationship with the vendor. So also, an investigation into a person's affairs by a government lawyer, or by special counsel by a government lawyer, or by special counsel employed by the government, is not an evaluation as that term is used in this Rule. The question is whether the lawyer is retained by the person whose affairs are being examined. When the lawyer is retained by that person, the general rules concerning loyalty to client and preservation of confidences apply, which is not the case if the lawyer is retained by someone else. For this reason, it is essential to identify the person by whom the lawyer is retained. This should be made clear not only to the person under examination, but also to others to whom the results are to be made available.

Duties Owed to Third Person and Client

[3] When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this rule. However, since such an evaluation involves a departure from the normal client-lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken in behalf of the client. For example, if the lawyer is acting as advocate in defending the client against

charges of fraud, it would normally be incompatible with that responsibility for the lawyer to perform an evaluation for others concerning the same or a related transaction. Assuming no such impediment is apparent, however, the lawyer should advise the client of the implications of the evaluation, particularly the lawyer's responsibilities to third persons and the duty to disseminate the findings.

Access to and Disclosure of Information

[4] The quality of an evaluation depends on the freedom and extent of the investigation upon which it is based. Ordinarily a lawyer should have whatever latitude of investigation seems necessary as a matter of professional judgment. Under some circumstances, however, the terms of the evaluation may be limited. For example, certain issues or sources may be categorically excluded, or the scope of search may be limited by time constraints or the noncooperation of persons having relevant information. Any such limitations that are material to the evaluation should be described in the report. If after a lawyer has commenced an evaluation, the client refuses to comply with the terms upon which it was understood the evaluation was to have been made, the lawyer's obligations are determined by law, having reference to the terms of the client's agreement and the surrounding circumstances. In no circumstances is the lawyer permitted to knowingly make a false statement of material fact or law in providing an evaluation under this Rule. See Rule 4.1.

Obtaining Client's Informed Consent

[5] Information relating to an evaluation is protected by Rule 1.6. In many situations, providing an evaluation to a third party poses no significant risk to the client; thus, the lawyer may be impliedly authorized to disclose information to carry out the representation. See Rule 1.6(a). Where, however, it is reasonably likely that providing the evaluation will affect the client's interests materially and adversely, the lawyer must first obtain the client's consent after the client has been adequately informed concerning the important possible effects on the client's interests. See Rules 1.6(a) and 1.0(e).

Financial Auditors' Requests for Information

[6] When a question concerning the legal situation of a client arises at the instance of the client's financial auditor and the question is referred to the lawyer, the lawyer's re-

sponse may be made in accordance with procedures recognized in the legal profession. Such a procedure is set forth in the American

Bar Association Statement of Policy Regarding lawyers' Responses to Auditors' Requests for Information, adopted in 1975.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to Rule 2.3 in the Code.

Rule 2.4. Lawyer serving as third-party neutral.

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

COMMENT

[1] Alternative dispute resolution has become a substantial part of the civil justice system. Aside from representing clients in dispute-resolution processes, lawyers often serve as third-party neutrals. A third-party neutral is a person, such as a mediator, arbitrator, conciliator or evaluator, who assists the parties, represented or unrepresented, in the solution of a dispute or in the arrangement of a transaction. Whether a third-party neutral serves primarily as a facilitator, evaluator or decisionmaker depends on the particular process that is either selected by the parties or mandated by a court.

[2] The role of a third-party neutral is not unique to lawyers, although, in some court-connected contexts, only lawyers are allowed to serve in this role or to handle certain types of cases. In performing this role, the lawyer may be subject to court rules or other law that apply either to third-party neutrals generally or to lawyers serving as third-party neutrals. Lawyer-neutrals may also be subject to various codes of ethics, such as the Code of Ethics for Arbitration in Commercial Disputes prepared by a joint committee of the American Bar Association and the American Arbitration Association or the Model Standards of Conduct for Mediators jointly prepared by the American Bar Association, the American Arbitration Association and the Society of Professionals in Dispute Resolution.

[3] Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role

may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process. Thus, paragraph (b) requires a lawyer-neutral to inform unrepresented parties that the lawyer is not representing them. For some parties, particularly parties who frequently use dispute-resolution processes, this information will be sufficient. For others, particularly those who are using the process for the first time, more information will be required. Where appropriate, the lawyer should inform unrepresented parties of the important differences between the lawyer's role as third-party neutral and a lawyer's role as a client representative, including the inapplicability of the attorney-client evidentiary privilege. The extent of disclosure required under this paragraph will depend on the particular parties involved and the subject matter of the proceeding, as well as the particular features of the dispute-resolution process selected.

[4] A lawyer who serves as a third-party neutral subsequently may be asked to serve as a lawyer representing a client in the same matter. The conflicts of interest that arise for both the individual lawyer and the lawyer's law firm are addressed in Rule 1.12.

[5] Lawyers who represent clients in alternative dispute-resolution processes are governed by the Rules of Professional Conduct.

When the dispute-resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(m)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise,

the lawyer's duty of candor toward both the third-party neutral and other parties is governed by Rule 4.1.

ADVOCATE

Rule 3.1. Meritorious claims and contentions.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

COMMENT

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable

law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 7-102(A)(1) provides that a lawyer may not "file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." Rule 3.1 is to the same general effect as DR 7-102(A)(1), with three qualifications. First, the test of improper conduct is changed from "merely to harass or maliciously injure another" to the requirement that there be a basis for the litigation measure involved that is "not frivolous." This includes the concept stated in DR 7-102(A)(2) that a lawyer may

advance a claim or defense unwarranted by existing law if "it can be supported by good faith argument for an extension, modification, or reversal of existing law." Second, the test in Rule 3.1 is an objective test, whereas DR 7-102(A)(1) applies only if the lawyer "knows or when it is obvious" that the litigation is frivolous. Third, Rule 3.1 has an exception that in a criminal case, or a case in which incarceration of the client may result (for example, certain juvenile proceedings), the lawyer may put the prosecution to its proof even if there is no nonfrivolous basis for defense.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Sullivan, The Need for a Business or Payroll Records Affidavit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

CASE NOTES

Improper Conduct.

Where an attorney admitted he was incompetent in bankruptcy matters and yet filed several motions and complaints, his behavior was continually insulting, abusive, and disruptive to the court, to witnesses, and to opposing counsel despite repeated warnings, and his allegations were not founded in fact according to his own admission, and apparently were brought for the purposes of harassment and intimidation, a one-year suspension was not unduly severe. *Dodrill v. Executive Dir.*, 308 Ark. 301, 824 S.W.2d 383 (1992).

Attorney violated this rule and Ark. R. Prof. 4.4 where he knowingly filed a lis pendens notice in a civil suit seeking damages and, even after being notified that it was improper, took almost two months to make any attempt to correct his error. *Thompson v. Supreme Court Comm. on Prof'l Conduct*, 369 Ark. 186, 252 S.W.3d 125 (2007).

Cited: *Crockett & Brown v. Wilson*, 314 Ark. 578, 864 S.W.2d 244 (1993); *Cortinez v. Supreme Court Comm.*, 332 Ark. 456, 966 S.W.2d 251 (1998).

Rule 3.2. Expediting litigation.

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

COMMENT

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It

is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 7-102(A)(1) provides that "A lawyer shall not ... file a suit, assert a position, conduct a defense (or) delay a trial ... when he

knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Rule 3.3. Candor toward the tribunal.

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal; or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures including, if necessary, disclosure to the

tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or had engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

COMMENT

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a

disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such

disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done — making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presen-

tation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the

lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

CODE COMPARISON PRIOR TO 2005 REVISION

Rule 3.3(a)(1) is substantially identical to DR 7-102(A)(5), which provides that a lawyer shall not "knowingly make a false statement of law or fact."

Rule 3.3(a)(2) is implicit in DR 7-102(A)(3), which provides that "a lawyer shall not ... knowingly fail to disclose that which he is required by law to reveal."

Rule 3.3(a)(3) is identical to DR 7-106(B)(1).

With regard to Rule 3.3(a)(4), the first sentence of this subparagraph is similar to DR 7-102(A)(4), which provides that a lawyer shall not "knowingly use" perjured testimony or false evidence. The second sentence of Rule 3.3(a)(4) resolves an ambiguity in the Code concerning the action required of a lawyer when he discovers that he has offered perjured testimony or false evidence. DR 7-102(A)(4), quoted above, does not expressly deal with this situation, but the prohibition against "use" of false evidence can be construed to preclude carrying through with a case based on such evidence when that fact has become known during the trial. DR 7-102(B)(1), also noted in connection with Rule 1.6, provides that "a lawyer who receives information clearly establishing that ... his

client has ... perpetrated a fraud upon ... a tribunal shall if the client does not rectify the situation ... reveal the fraud to the ... tribunal" Since use of perjured testimony or false evidence is usually regarded as "fraud" upon the court, DR 7-102(B)(1) apparently requires disclosure by the lawyer in such circumstances. However, some states have amended DR 7-102(B)(1) in conformity with an ABA-recommended amendment to provide that the duty of disclosure does not apply when the "information is protected as a privileged communication." This qualification may be empty, for the rule of attorney-client privilege has been construed to exclude communications that further a crime, including the crime of perjury. On this interpretation of DR 7-102(B)(1), the lawyer has a duty to disclose the perjury.

Rule 3.3(c) confers discretion on the lawyer to refuse to offer evidence that he "reasonably believes" is false. This gives the lawyer more latitude than DR 7-102(A)(4), which prohibits the lawyer from offering evidence the lawyer "knows" is false.

There is no counterpart in the Code to paragraph (d).

CASE NOTES

ANALYSIS

In general.
Closing argument.
Eliciting false testimony.

In General.

Lawyers have a duty to disclose to the judge all the material facts of the case, and failure to do so violates the clear wording, as well as the spirit, of the rules of conduct. *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992).

Closing Argument.

There is no reason why a prosecutor should be foreclosed from contesting, during closing argument, any part of a defendant's statement which the prosecutor believes to be untrue. *Trimble v. State*, 316 Ark. 161, 871 S.W.2d 562 (1994).

Eliciting False Testimony.

Attorney for a Chapter 7 debtor violated this rule in her lack of candor toward the court that included eliciting false testimony of

the debtor that contradicted the stipulations she had previously signed and filed with the court. In re Robinson, 373 B.R. 612 (Bankr. E.D. Ark. 2007), aff'd 557 F.3d 593 (8th Cir. 2009).

Cited: Noel v. State, 342 Ark. 35, 26 S.W.3d 123 (2000).

Rule 3.4. Fairness to opposing party and counsel.

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

[2] Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed. Applicable law in many jurisdictions makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material

generally, including computerized information. Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances.

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee.

[4] Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 3.4(a), DR 7-109(A) provides that “a lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal.” DR 7-109(B) provides that “a lawyer shall not advise or cause a person to secrete himself ... for the purpose of making him unavailable as a witness ...” DR 7-106(C)(7) provides that a lawyer shall not “intentionally or habitually violate any established rule of procedure or of evidence.”

With regard to Rule 3.4(b), DR 7-102(B)(6) provides that a lawyer shall not “participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.” DR 7-109 provides that “a lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent on the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee or acquiesce in the payment of: (1) expenses reasonably incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for his loss of time in attending or testifying; (or) (3) a reasonable fee for the professional services of an expert witness.” EC 7-28 states that “witnesses should always testify truthfully and

should be free from any financial inducements that might tempt them to do otherwise.”

Rule 3.4(c) is substantially similar to DR 7-106(A), which provides that “A lawyer shall not disregard ... a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.”

Rule 3.4(d) has no counterpart in the Code.

Rule 3.4(e) substantially incorporates DR 7-106(C)(1), (2), (3) and (4). DR 7-106(C)(2) proscribes asking a question “intended to degrade a witness or other person,” a matter dealt with in Rule 4.4. DR 7-106(C)(5), providing that a lawyer shall not “fail to comply with known local customs of courtesy or practice,” is too vague to be a rule of conduct enforceable as law.

With regard to Rule 3.4(f), DR 7-104(A)(2) provides that a lawyer shall not “give advice to a person who is not represented ... other than advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.”

CASE NOTES

ANALYSIS

Failure to object.
Untruthful deposition.

Failure to Object.

Counsel was not ineffective for failing to object to prosecutor’s statement to the jury during closing argument asking them to “send a message”; even if this statement were improper under subsection (e) of this rule, an alleged violation of the Arkansas Rules of Professional Conduct does not automatically translate into ineffective assistance of counsel. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004).

Untruthful Deposition.

Suspension of the attorney’s license to practice law was appropriate because he violated subsection (c) of this rule and Ark. R. Prof. 8.4(c) when he lied during a deposition by stating that he had not represented a client in any other matters when he actually had represented the client in a criminal matter and several real estate transactions. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

Cited: *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992); *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995).

Rule 3.5. Impartiality and decorum of the tribunal.

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate;

or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

COMMENT

[1] Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the ABA Model Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

[3] A lawyer may on occasion want to communicate with a juror or prospective juror after the jury has been discharged. The lawyer may do so unless the communication is prohibited by law or a court order but must respect the desire of the juror not to talk with

the lawyer. The lawyer may not engage in improper conduct during the communication.

[4] The advocate's function is to present evidence and argument so that the cause may be decided according to law. Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants. A lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate. An advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics.

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(m).

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 3.5(a), DR 7-108(A) provides that "before the trial of a case a lawyer ... shall not communicate with ... anyone he knows to be a member of the venire" DR 7-108(B) provides that "during the trial of a case ... a lawyer ... shall not communicate with ... a juror concerning the case." DR 7-109(C) provides that a lawyer shall not "communicate ... as to the merits of

the cause with a judge or an official before whom the proceeding is pending except ... upon adequate notice to opposing counsel ... (or) as otherwise authorized by law."

With regard to Rule 3.5(b), DR 7-106(C)(6) provides that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal."

CASE NOTES

Cited: *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992).

Rule 3.6. Trial publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. A statement referred to in this paragraph ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any

confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

(b) Notwithstanding paragraph (a) and its sub-paragraphs, a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

COMMENT

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the

exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at assuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the

subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] The Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, the rule applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] Reserved.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury hearings and arbitration proceedings may be even less affected. The Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer, or third persons, where a reasonable lawyer would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.

CODE COMPARISON PRIOR TO 2005 REVISION

Rule 3.6 is similar to DR 7-107, except as follows: First, Rule 3.6 adopts the general criteria of "substantial likelihood of materially prejudicing an adjudicative proceeding" to describe impermissible conduct. Second, Rule 3.6 transforms the particulars in DR 7-107 into an illustrative compilation that gives fair notice of conduct ordinarily posing unacceptable dangers to the fair administration of justice. Finally, Rule 3.6 omits DR

7-107(C)(7), which provides that a lawyer may reveal "at the time of seizure, a description of the physical evidence seized, other than a confession, admission or statement." Such revelations may be substantially prejudicial and are frequently the subject of pretrial suppression motions, which, if successful, may be circumvented by prior disclosure to the press.

Rule 3.7. Lawyer as witness.

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) Reserved.

COMMENT

[1] Combining the roles of advocate and witness can prejudice the tribunal and the

opposing party and can also involve a conflict of interest between the lawyer and client.

Advocate-Witness Rule

[2] The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[3] To protect the tribunal, paragraph (a) prohibits a lawyer from simultaneously serving as advocate and necessary witness except in those circumstances specified in paragraphs (a)(1) through (a)(3). Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical. Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony.

[4] Apart from these two exceptions, paragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that

the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.

[5] Reserved.

Conflict of Interest

[6] In determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.0(b) for the definition of "confirmed in writing" and Rule 1.0(e) for the definition of "informed consent."

[7] Reserved.

[8] This Rule is not intended to ordinarily prohibit a lawyer from being a witness when the lawyer is also the party of record. A lawyer may represent himself or herself pro se, or be represented by other lawyers in his or her firm, and in either event he or she should be permitted in that instance to appear as a witness.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 5-102(A) prohibits a lawyer, or the lawyer's firm, from serving as advocate if the lawyer "learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client." DR 5-102(B) provides that a lawyer, and the lawyer's firm, may continue representation if the "lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client ... until it is apparent that his testimony is or may be prejudicial to his client." DR 5-101(B) permits a lawyer to testify while representing a client: "(1) If the

testimony will relate solely to an uncontested matter; (2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; (3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client; (4) As to any matter if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case."

The exception stated in (1) consolidates

provisions of DR 5-101(B)(1) and (2). Testimony relating to a formality, referred to in DR

5-101(B)(2), in effect defines the phrase “uncontested issue,” and is redundant.

RESEARCH REFERENCES

Ark. L. Rev. Lyon & Phillips, Professional responsibility in the Federal Courts: Consistency is Cloaked in Confusion, 50 Ark. L. Rev. 59.

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

CASE NOTES

ANALYSIS

Construction.

Purpose.

Appeals.

Criminal proceeding.

Disqualification of counsel.

Illustrative cases.

Noncompliance.

Testimony.

Uncontested issue.

Workers' compensation hearing.

Construction.

This rule deals with situations where the lawyer is to be a witness on behalf of his or her client, not when the lawyer is called as a witness by the opposing party. *Purtle v. McAdams*, 317 Ark. 499, 879 S.W.2d 401 (1994), overruled in part *Weigel v. Farmers Ins. Co.*, 356 Ark. 617, 158 S.W.3d 147 (2004).

Purpose.

The reasoning underlying the general rule is to prevent prejudice and a conflict of interest. *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995).

Combining the dissimilar roles of attorney and witness can prejudice the opposing party and can involve a conflict of interest between the lawyer and his client. *Arthur v. Zearley*, 320 Ark. 273, 895 S.W.2d 928 (1995).

Appeals.

An attorney cannot represent a party on appeal if the attorney testified below. *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990).

Criminal Proceeding.

When a prosecutor undertakes an active role in the investigation of a crime so that he potentially becomes a material witness for the state or the defense, he no longer may serve as the advocate for the state; however, disqualification would not be required in a case where the prosecutor merely takes a statement from a potential witness or where his actions were part of a prosecutor's routine preparation for trial. *Chelette v. State*, 308 Ark. 364, 824 S.W.2d 389 (1992).

Where prosecutor assisted the defendant in signing an affidavit against the victim, and

his testimony at trial described that ministerial duty, and no facts favorable to the state arose out of that meeting, the prosecutor correctly was not disqualified. *Chelette v. State*, 308 Ark. 364, 824 S.W.2d 389 (1992).

A prosecutor may describe in his opening statement and argument to the jury his theory of the case developed after his meeting with the defendant, which is legitimate argument, and not testimony regarding the facts he had observed. *Chelette v. State*, 308 Ark. 364, 824 S.W.2d 389 (1992).

If a prosecutor's closing argument contains facts he personally could verify which were favorable to the state, and he endorsed those facts by adding that in his opinion the authorities had acted appropriately, that would amount to testimony in his argument, and would be distinguishable from espousing a theory of the case. *Chelette v. State*, 308 Ark. 364, 824 S.W.2d 389 (1992).

In a case involving capital murder and other crimes, a prosecutor was not barred from prosecuting the case under this rule because he was not a material witness based on the fact that the prosecutor showed a witness to the crime a photo spread that contained defendant's picture. *Herrod v. State*, 371 Ark. 7, 262 S.W.3d 609 (2007).

Disqualification of Counsel.

Where appellant subpoenaed appellee's attorney, claiming his testimony was central to the issues in the case, and then moved to disqualify the attorney and his firm under Ark. Model R. Prof. Conduct 1.10 and this rule, as the motion was filed less than two weeks before trial, the trial court did not abuse its discretion in denying it, as disqualification would have worked a great injustice on appellee and forced a lengthy postponement of the trial. *Forever Green Ath. Fields, Inc. v. Lasiter Constr., Inc.*, 2011 Ark. App. 347, — S.W.3d —, 2011 Ark. App. LEXIS 390 (May 11, 2011).

Illustrative Cases.

In a suit to determine the ownership of an island, the trial court did not err by permitting an attorney to testify on a litigant's behalf. Even though the attorney served as counsel for the litigant and prosecuted part of

this case, he did not testify in any proceeding in which he served as counsel. *State v. Hatchie Coon Hunting & Fishing Club, Inc.*, 98 Ark. App. 206, 254 S.W.3d 11 (2007).

Noncompliance.

When an attorney serves as both witness and advocate in the same action, that fact alone does not require automatic reversal and dismissal of a case. *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990).

Where an attorney submits an affidavit supporting his client's motion, the attorney served as witness and advocate and the affidavit was not considered as evidence. *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990).

Where attorney for estate was expected to be a witness, and his client, the executor, had already retained another attorney to represent the executor's interests, the former attorney's disqualification as an advocate would not work a substantial hardship on the executor; thus, once the trial started and the former attorney reassumed his role as an advocate, it was too late for him to become a witness, and under the circumstances, the trial court erred in allowing the former attorney to testify as a witness. *Smith v. Wharton*, 349 Ark. 351, 78 S.W.3d 79 (2002).

Testimony.

When the affiant is an attorney in the case, and the affidavit is submitted in support of a motion, whether attached to the motion itself or to the brief, it is tantamount to the attorney testifying. *McIntosh v. Southwestern Truck Sales*, 304 Ark. 224, 800 S.W.2d 431 (1990).

Trial court correctly disqualified attorney after he chose to submit an evidentiary affidavit and to testify in a procedural matter. *International Resource Ventures, Inc. v. Diamond Mining Co. of Am.*, 326 Ark. 765, 934 S.W.2d 218 (1996).

Trial court did not abuse its discretion in

disqualifying litigant's attorney where this rule prohibited the attorney from being an advocate because he was likely to be a necessary witness, and the rule's prohibition was not limited to cases in which the attorney would give testimony on behalf of his client. *Weigel v. Farmers Ins. Co.*, 356 Ark. 617, 158 S.W.3d 147 (2004).

Uncontested Issue.

Plaintiff's testimony did not relate to any contested issue and prohibition contained in this rule did not apply to him or his law partners. *Arkansas Blue Cross & Blue Shield, Inc. v. Doe*, 22 Ark. App. 89, 733 S.W.2d 429 (1987), questioned *Garred v. General American Life Ins. Co.*, 774 F. Supp. 1190 (W.D. Ark. 1991).

Trial court did not err in denying a property owner's motion to disqualify a city's attorney; although the attorney had drafted the ordinance that called for the election, which the owner challenged, the owner's attack was on the lands within the area being annexed not meeting the statutory requirements, not the manner in which the ordinance was drafted, and disqualification of the attorney was not necessary. *Uteley v. City of Dover*, 352 Ark. 212, 101 S.W.3d 191 (2003).

Workers' Compensation Hearing.

The same policy reasons which forbid an attorney from testifying in a courtroom trial are present when a lawyer testifies in a hearing before the Workers' Compensation Commission when the Commission is discharging its quasi-judicial responsibilities, and the problem is not cured simply because the attorney testifies in affidavit form. *International Paper Co. v. Wilson*, 34 Ark. App. 87, 805 S.W.2d 668 (1991).

Cited: *New Prospect Drilling Co. v. First Com. Trust*, 332 Ark. 466, 966 S.W.2d 233 (1998); *In re Wilson*, 250 B.R. 686 (Bankr. E.D. Ark. 2000); *Schuessler v. Schuessler*, 86 Ark. App. 347, 185 S.W.3d 107 (2004).

Rule 3.8. Special responsibilities of a prosecutor.

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known

to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; and

(e) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.

Publisher's Notes. The Per Curiam of the Arkansas Supreme Court dated November 19, 1990, provided, in part, that: "The canon can presently be read to provide that an appointment based on merit is proper, regard-

less of its nepotistic character. We do not intend for the provision to be so read. Accordingly, we amend Canon 3(B)(4) of the Arkansas Code of Judicial Conduct to provide as follows: ..."

COMMENT

[1] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Precisely how far the prosecutor is required to go in this direction is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

[2] In some jurisdictions, a defendant may waive a preliminary hearing and thereby lose a valuable opportunity to challenge probable cause. Accordingly, prosecutors should not seek to obtain waivers of preliminary hearings or other important pretrial rights from unrepresented accused persons. Paragraph (c) does not apply, however, to an accused appearing pro se with the approval of the tribunal. Nor does it forbid the lawful questioning of an uncharged suspect who has knowingly waived the rights to counsel and silence.

[3] The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest.

[4] Paragraph (e) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing

an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

[5] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (e) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (e) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

[6] The issuance of a grand jury indictment ordinarily indicates probable cause for the prosecutor to proceed. This rule covers the Attorney General and staff, Prosecuting Attorneys and staffs, City Attorneys and staffs and all others who exercise prosecutorial functions.

RESEARCH REFERENCES

Ark. L. Rev. Bessler, The Public Interest and the Unconstitutionality of Private Prosecutors, 47 Ark. L. Rev. 511.

CASE NOTES

Cited: Arkansas Gazette Co. v. Goodwin, 304 Ark. 204, 801 S.W.2d 284 (1990); Walker v. State, 309 Ark. 23, 827 S.W.2d 637 (1992).

Rule 3.9. Advocate in nonadjudicative proceedings.

A lawyer representing a client before a legislative or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

COMMENT

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.

[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administra-

tive agencies have a right to expect lawyers to deal with them as they deal with courts.

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.

CODE COMPARISON PRIOR TO 2005 REVISION

EC 7-15 states that "A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law." EC 7-16 states that "When a lawyer appears, in connection with proposed legislation, he ... should comply with applicable laws and regulations." EC 8-5 states that "Fraudulent,

deceptive, or otherwise illegal conduct by a participant in a proceeding before a ... legislative body should never be participated in ... by lawyers." DR 7-106(B)(1) provides that "In presenting a matter to a tribunal, a lawyer shall disclose ... unless privileged or irrelevant, the identity of the clients he represents and of the persons who employed him."

CASE NOTES

Workers' Compensation Hearing.

The same policy reasons which forbid an attorney from testifying in a courtroom trial are present when a lawyer testifies in a hear-

ing before the Workers' Compensation Commission when the Commission is discharging its quasi-judicial responsibilities, and the problem is not cured simply because the at-

torney testifies in affidavit form. *International Paper Co. v. Wilson*, 34 Ark. App. 87, 805 S.W.2d 668 (1991).

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

Rule 4.1. Truthfulness in statements to others.

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

COMMENT

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the

principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

CODE COMPARISON PRIOR TO 2005 REVISION

Rule 4.1(a) is substantially similar to DR 7-102(A)(5), which states that "In his representation of a client, a lawyer shall not ... knowingly make a false statement of law or fact."

With regard to Rule 4.1(b), DR 7-102(A)(3) provides that a lawyer shall not "conceal or knowingly fail to disclose that which he is required by law to reveal."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Seventeenth Annual Survey of Arkansas Law — Criminal Law, 17 U. Ark. Little Rock L.J. 448.

CASE NOTES

ANALYSIS

Confidentiality.
Disclosure.
Fraud by attorney.

Confidentiality.

Subject to certain exceptions, confidentiality of all communications, complaints, formal complaints, testimony, and evidence based upon a complaint, is absolutely privileged. *Colvin v. Committee on Professional Conduct*, 309 Ark. 592, 832 S.W.2d 246 (1992).

Disclosure.

Lawyers have a duty to disclose to the judge all the material facts of the case, and failure

to do so violates the clear wording, as well as the spirit, of the rules of conduct. *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992).

Fraud by Attorney.

When attorney filed fraudulent insurance claims on behalf of others, he abused his position of public trust; moreover, his status as a licensed attorney shrouded the claims with a presumption of regularity, and thus contributed significantly to facilitating the commission of the fraud. *United States v. Post*, 25 F.3d 599 (8th Cir. 1994).

Rule 4.2. Communication with person represented by counsel.

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law.

COMMENT

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

[2] This Rule applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a

matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

[7] In the case of a represented organiza-

tion, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule. Compare Rule 3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of

obtaining evidence that violate the legal rights of the organization. See Rule 4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4.3.

CODE COMPARISON PRIOR TO 2005 REVISION

This Rule is substantially identical to DR 7-104(A)(1).

RESEARCH REFERENCES

Ark. L. Rev. The Ethics of Communicating with an Organization's Employees: An Analysis of the Unworkable "Hybrid" or "Multifac-

tor" Managing-Speaking Agent, ABA, and Niesig Tests and a Proposal for a "Supervisor" Standard, 45 Ark. L. Rev. 801.

CASE NOTES

ANALYSIS

Applicability.

Communication denied.

Applicability.

Railroad's motion in limine to prohibit two employees from testifying based on the opposing lawyer's communication with them was denied because the version of this rule that the railroad relied on had been amended; the rule no longer prohibited lawyers from communicating with a party's employees about a case and the motion was otherwise ground-

less. *Paris v. Union Pac. R.R.*, 450 F. Supp. 2d 913 (E.D. Ark. 2006).

Communication Denied.

In a negligence case, a trial court did not abuse its discretion in denying a request for communication with current and former employees of a corporation under this rule because there were broad allegations made in the complaint regarding vicarious liability. *Donna Watkins v. Ark. Elder Outreach of Little Rock, Inc.*, 2012 Ark. App. 301, — S.W.3d —, 2012 Ark. App. LEXIS 430 (May 2, 2012).

Rule 4.3. Dealing with unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

COMMENT

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(d).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the un-

represented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no direct counterpart to this Rule in the Code. DR 7-104(A)(2) provides that a lawyer shall not "[g]ive advice to a person who

is not represented by a lawyer, other than the advice to secure counsel ..."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Sullivan, The Need for a Business or Payroll Records Affi-

davit for Use in Child Support Matters, 11 U. Ark. Little Rock L.J. 651.

Rule 4.4. Respect for rights of third persons.

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties

or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or

reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, “document” includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the law-

yer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 7-106(C)(2) provides that a lawyer shall not “ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.” DR 7-102(A)(1) provides that a lawyer shall not “take ... action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” DR 7-108(D)

provides that “after discharge of the jury ... the lawyer shall not ask questions or make comments to a member of that jury that are calculated merely to harass or embarrass the juror ...” DR 7-108(E) provides that “a lawyer shall not conduct ... a vexatious or harassing investigation of either a venireman or a juror.”

CASE NOTES

Improper Conduct.

Attorney violated Ark. R. Prof. 3.1 and this rule where he knowingly filed a *lis pendens* notice in a civil suit seeking damages and, even after being notified that it was improper,

took almost two months to make any attempt to correct his error. *Thompson v. Supreme Court Comm. on Prof'l Conduct*, 369 Ark. 186, 252 S.W.3d 125 (2007).

LAW FIRMS AND ASSOCIATIONS

Rule 5.1. Responsibilities of a partner, managers, and supervisory lawyers.

(a) A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

(c) A lawyer shall be responsible for another lawyer’s violation of the rules of professional conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This

includes members of a partnership and, the shareholders in a law firm organized as a professional corporation, and members of

other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

[3] Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. See Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

[5] Paragraph (c)(2) defines the duty of a partner or other lawyer having comparable managerial authority in a law firm, as well as a lawyer who has direct supervisory authority over performance of specific legal work by another lawyer. Whether a lawyer has supervisory authority in particular circumstances is a question of fact. Partners and lawyers with comparable authority have at least indirect responsibility for all work being done by the firm, while a partner or manager in charge of a particular matter ordinarily also has supervisory responsibility for the work of other firm lawyers engaged in the matter. Appropriate remedial action by a partner or managing lawyer would depend on the immediacy of that lawyer's involvement and the seriousness of the misconduct. A supervisor is required to intervene to prevent avoidable consequences of misconduct if the supervisor knows that the misconduct occurred. Thus, if a supervising lawyer knows that a subordinate misrepresented a matter to an opposing party in negotiation, the supervisor as well as the subordinate has a duty to correct the resulting misapprehension.

[6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

[7] Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

[8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

CODE COMPARISON PRIOR TO 2005 REVISION

There is no direct counterpart to this Rule in the Code. DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of

a violation of DR 1-102 shall report such knowledge to ... authority empowered to investigate or act upon such violation."

Rule 5.2. Responsibilities of a subordinate lawyer.

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

COMMENT

[1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

[2] When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for

making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to this Rule in the Code.

Rule 5.3. Responsibilities regarding nonlawyer assistants.

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the rules of professional conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has the direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

COMMENT

[1] Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation

not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

[2] Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to establish internal

policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with the Rules of Professional Conduct. See Comment [1] to Rule 5.1. Paragraph (b) applies to lawyers who have supervisory authority over the

work of a nonlawyer. Paragraph (c) specifies the circumstances in which a lawyer is responsible for conduct of a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no direct counterpart to this Rule in the Code. DR 4-101(D) provides that "A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a

client..." DR 7-107(J) provides that "a lawyer shall exercise reasonable care to prevent his employees and associates from making an extrajudicial statement that he would be prohibited from making under DR 7-107."

RESEARCH REFERENCES

ALR. Propriety and Effect of Law Students Acting as Counsel in Court Suit. 62 ALR 6th 259.

CASE NOTES

Communicating with Client.

Attorney violated this section by failing to supervise his non-lawyer staff as to appropri-

ate handling of a client's legal claim. *Mays v. Neal*, 327 Ark. 302, 938 S.W.2d 830 (1997).

Rule 5.4. Professional independence of a lawyer.

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer an agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement, and

(4) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

COMMENT

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

CODE COMPARISON PRIOR TO 2005 REVISION

DR 3-102(A) provides that "A lawyer or law firm shall not share legal fees with a nonlawyer ..." DR 3-103(A) provides that "A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law." DR 5-107(B) provides that "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR 5-107(C) provides that "A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) A nonlawyer owns any interests therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration; (2) A nonlawyer is a corporate director or officer thereof; or (3) A nonlawyer has the right to direct or control the professional judgment of the lawyer." EC 5-24 states that "A lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any

director, officer, or stockholder of it is a nonlawyer. Although a lawyer may be employed by a business corporation with nonlawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant ..."

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, Ethical Issues in Representing Clients with Diminished Capacity, 2003 Ark. L. Notes 57.

Rule 5.5. Unauthorized practice of law, multijurisdictional practice of law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires *pro hac vice* admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

COMMENT

[1] A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

[2] The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of

legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work. See Rule 5.3.

[3] A lawyer may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law; for example, claims adjusters, employees of financial or commercial institutions, social workers, accountants and persons employed in government agencies. Lawyers also may assist independent nonlawyers, such as paraprofessionals, who are authorized by the law

of a jurisdiction to provide particular law-related services. In addition, a lawyer may counsel nonlawyers who wish to proceed pro se.

[4] Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b).

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraphs (d)(1) and (d)(2), this Rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice, because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the agency. Under paragraph (c)(2), a lawyer does not violate this Rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this Rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this Rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in

this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

[15] Paragraph (d) identifies two circumstances in which a lawyer who is admitted to practice in another United States jurisdiction, and is not disbarred or suspended from practice in any jurisdiction, may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law as well as provide legal services on a temporary basis. Except as provided in paragraphs (d)(1) and (d)(2), a lawyer who is admitted to practice law in another jurisdiction and who establishes an office or other systematic or continuous presence in this jurisdiction must become admitted to practice law generally in this jurisdiction.

[16] Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal

services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. This paragraph does not authorize the provision of personal legal services to the employer's officers or employees. The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

[17] If an employed lawyer establishes an office or other systematic presence in this jurisdiction for the purpose of rendering legal services to the employer, the lawyer may be subject to registration or other requirements, including assessments for client protection funds and mandatory continuing legal education.

[18] Paragraph (d)(2) recognizes that a lawyer may provide legal services in a jurisdiction in which the lawyer is not licensed when authorized to do so by federal or other law, which includes statute, court rule, executive regulation or judicial precedent.

[19] A lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

[20] In some circumstances, a lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b).

[21] Paragraphs (c) and (d) do not authorize communications advertising legal services to prospective clients in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services to prospective clients in this jurisdiction is governed by Rules 7.1 to 7.5.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 5.5(a), DR 3-101(B) of the Model Code provides that "a lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction."

With regard to Rule 5.5(b), DR 3-101(A) of the Model Code provides that "a lawyer shall not aid a nonlawyer in the unauthorized practice of law."

RESEARCH REFERENCES

ALR. Matters Constituting Unauthorized Practice of Law in Bankruptcy Proceedings. 32 ALR 6th 531.

Rule 5.6. Restrictions on right to practice.

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning, either benefits upon retirement or an agreement pursuant to the provisions of Rule 1.17; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.

COMMENT

[1] An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

[2] Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.

[3] This Rule does not apply to prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

CODE COMPARISON PRIOR TO 2005 REVISION

Rule 5.6 is substantially similar to DR 2-108.

RESEARCH REFERENCES

Ark. L. Notes. Kilpatrick, Changing Firms or Offices: Doing it Right, 2002 Ark. L. Notes 39.

Rule 5.7. Responsibilities regarding law-related services.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by a separate entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services of the separate entity are not legal services and that the protections of the client-lawyer relationship do not exist.

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

COMMENT

[1] When a lawyer performs law-related services or controls an organization that does so, there exists the potential for ethical problems. Principal among these is the possibility that the person for whom the law-related services are performed fails to understand that the services may not carry with them the protections normally afforded as part of the client-lawyer relationship. The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests and obligations of a lawyer to maintain professional independence apply to the provision of law-related services when that may not be the case.

[2] Rule 5.7 applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity. The Rule identifies the circumstances in which all of the Rules of Professional Conduct apply to the provision of law-related services. Even when those circumstances do not exist, however, the conduct of a lawyer involved in the provision of law-related services is subject to those Rules that apply generally to lawyer conduct, regardless of whether the conduct involves the provision of legal services. See, e.g., Rule 8.4.

[3] When law-related services are provided by a lawyer under circumstances that are not distinct from the lawyer's provision of legal services to clients, the lawyer in providing the law-related services must adhere to the requirements of the Rules of Professional Conduct as provided in Rule 5.7 paragraph (a)(1). Even when the law-related and legal services are provided in circumstances that are distinct from each other, for example through separate entities or different support staff within the law firm, the Rules of Professional Conduct apply to the lawyer as provided in paragraph (a)(2) unless the lawyer takes reasonable measures to assure that the recipient of the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not apply.

[4] Law-related services also may be provided through an entity that is distinct from that through which the lawyer provides legal services. If the lawyer individually or with others has control of such an entity's operations, the Rule requires the lawyer to take reasonable measures to assure that each person using the services of the entity knows that the services provided by the entity are not legal services and that the Rules of Profes-

sional Conduct that relate to the client-lawyer relationship do not apply. A lawyer's control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.

[5] When a client-lawyer relationship exists with a person who is referred by a lawyer to a separate law-related service entity controlled by the lawyer, individually or with others, the lawyer must comply with Rule 1.8(a).

[6] In taking the reasonable measures referred to in paragraph (a)(2) to assure that a person using law-related services understands the practical effect or significance of the inapplicability of the Rules of Professional Conduct, the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing.

[7] The burden is upon the lawyer to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding. For instance, a sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual seeking tax advice from a lawyer-accountant or investigative services in connection with a lawsuit.

[8] Regardless of the sophistication of potential recipients of law-related services, a lawyer should take special care to keep separate the provision of law-related and legal services in order to minimize the risk that the recipient will assume that the law-related services are legal services. The risk of such confusion is especially acute when the lawyer renders both types of services with respect to the same matter. Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.

[9] A broad range of economic and other interests of clients may be served by lawyers'

engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

[10] When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest (Rules 1.7 through 1.11, especially Rules 1.7(b)(a)(2) and 1.8(a), (b) and (f)), and to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information. The promotion of the law-related services must

also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law.

[11] When the full protections of all of the Rules of Professional Conduct do not apply to the provision of law-related services, principles of law external to the Rules, for example, the law of principal and agent, govern the legal duties owed to those receiving the services. Those other legal principles may establish a different degree of protection for the recipient with respect to confidentiality of information, conflicts of interest and permissible business relationships with clients. See also Rule 8.4 (Misconduct).

PUBLIC SERVICE

Rule 6.1. Voluntary pro bono publico service.

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

In addition, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

COMMENT

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences

in the life of a lawyer. The American Bar Association urges all lawyers to provide a minimum of 50 hours of pro bono services annually. States, however, may decide to choose a higher or lower number of hours of annual service (which may be expressed as a

percentage of a lawyer's professional time) depending upon local needs and local conditions. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of his or her legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil matters or in criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless, cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (2), to the

extent that any hours of service remained unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing legal services to persons of limited means. Participation in *judicare* programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. Such financial support should be reasonably equivalent to the value of the hours of service that would have otherwise been provided. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[10] Because the efforts of individual lawyers are not enough to meet the need for free

legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart of Rule 6.1 in the Disciplinary Rules of the Code. EC 2-25 states that "The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer ... Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disad-

vantaged." EC 8-9 states that "The advancement of our legal system is of vital importance in maintaining the rule of law ... and lawyers should encourage, and should aid in making, needed changes and improvements." EC 8-3 states that "Those persons unable to pay for legal services should be provided needed services."

RESEARCH REFERENCES

Ark. L. Rev. Drecksel, *The Crisis in Indigent Criminal Defense*, 44 Ark. L. Rev. 363.

Rule 6.2. Accepting appointments.

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- (a) representing the client is likely to result in violation of the rules of professional conduct or other law;
- (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

COMMENT

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

Appointed Counsel

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter compe-

tently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to Rule 6.2 in the Disciplinary Rules of the Code. EC 2-29 states that "When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should not seek to be excused from undertaking the representation except for compelling reason. Compelling reasons do not include such factors as the repugnance of the

subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case." EC 2-30 states that "a lawyer should decline employment if the intensity of his personal feelings, as distinguished from a community attitude, may impair his effective representation of a prospective client."

Rule 6.3. Membership in legal services organization.

A lawyer may serve as a director, officer or member of a legal services organization, apart from the law firm in which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer. The lawyer shall not knowingly participate in a decision or action of the organization:

(a) if participating in the decision or action would be incompatible with the lawyer's obligations to a client under Rule 1.7; or

(b) where the decision or action could have a material adverse effect on the representation of a client of the organization whose interests are adverse to a client of the lawyer.

COMMENT

[1] Lawyers should be encouraged to support and participate in legal service organizations. A lawyer who is an officer or a member of such an organization does not thereby have a client-lawyer relationship with persons served by the organization. However, there is potential conflict between the interests of such persons and the interests of the lawyer's clients. If the possibility of such conflict disqualified a lawyer from serving on the board

of a legal services organization, the profession's involvement in such organizations would be severely curtailed.

[2] It may be necessary in appropriate cases to reassure a client of the organization that the representation will not be affected by conflicting loyalties of a member of the board. Established, written policies in this respect can enhance the credibility of such assurances.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to this Rule in the Code.

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Rule 6.4. Law reform activities affecting client interests.

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client.

COMMENT

[1] Lawyers involved in organizations seeking law reform generally do not have a client-lawyer relationship with the organization. Otherwise, it might follow that a lawyer could not be involved in a bar association law reform program that might indirectly affect a client. See also Rule 1.2(b). For example, a lawyer specializing in antitrust litigation might be regarded as disqualified from participating in drafting revisions of rules govern-

ing that subject. In determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7. A lawyer is professionally obligated to protect the integrity of the program by making an appropriate disclosure within the organization when the lawyer knows a private client might be materially benefitted.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to this Rule in the Code.

Rule 6.5. Nonprofit and court-annexed limited legal services programs.

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), Rule 1.10 is inapplicable to a representation governed by this Rule.

COMMENT

[1] Legal services organizations, courts and various nonprofit organizations have established programs through which lawyers provide short-term limited legal services such as advice or the completion of legal forms — that will assist persons to address their legal problems without further representation by a lawyer. In these programs, such as legal-advice hotlines, advice-only clinics or pro se counseling programs, a client-lawyer relationship is established, but there is no expectation that the lawyer's representation of the client will continue beyond the limited consultation. Such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation. See, e.g., Rules 1.7, 1.9 and 1.10.

[2] A lawyer who provides short-term limited legal services pursuant to this Rule must secure the client's informed consent to the limited scope of the representation. See Rule 1.2(c). If a short-term limited representation would not be reasonable under the circum-

stances, the lawyer may offer advice to the client but must also advise the client of the need for further assistance of counsel. Except as provided in this Rule, the Rules of Professional Conduct, including Rules 1.6 and 1.9(c), are applicable to the limited representation.

[3] Because a lawyer who is representing a client in the circumstances addressed by this Rule ordinarily is not able to check systematically for conflicts of interest, paragraph (a) requires compliance with Rules 1.7 or 1.9(a) only if the lawyer knows that the representation presents a conflict of interest for the lawyer, and with Rule 1.10 only if the lawyer knows that another lawyer in the lawyer's firm is disqualified by Rules 1.7 or 1.9(a) in the matter.

[4] Because the limited nature of the services significantly reduces the risk of conflicts of interest with other matters being handled by the lawyer's firm, paragraph (b) provides that Rule 1.10 is inapplicable to a representation governed by this Rule except as provided by paragraph (a)(2). Paragraph (a)(2)

requires the participating lawyer to comply with Rule 1.10 when the lawyer knows that the lawyer's firm is disqualified by Rules 1.7 or 1.9(a). By virtue of paragraph (b), however, a lawyer's participation in a short-term limited legal services program will not preclude the lawyer's firm from undertaking or continuing the representation of a client with interests adverse to a client being represented

under the program's auspices. Nor will the personal disqualification of a lawyer participating in the program be imputed to other lawyers participating in the program.

[5] If, after commencing a short-term limited representation in accordance with this Rule, a lawyer undertakes to represent the client in the matter on an ongoing basis, Rules 1.7, 1.9(a) and 1.10 become applicable.

INFORMATION ABOUT LEGAL SERVICES

Rule 7.1. Communications concerning a lawyer's services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(b) is likely to create an unjustified expectation about the results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law;

(c) compares the lawyer's services with other lawyers' services, unless the comparison can be factually substantiated; or

(d) contains a testimonial or endorsement.

Publisher's Notes. The Per Curiam Order dated September 26, 1994, provided: "On March 3, 1993, the Arkansas Bar Association and its Professional Ethics and Grievances Committee petitioned this Court to consider a revision of the Arkansas Rules of Professional Conduct regarding legal advertising and solicitation. As per our custom, this matter was referred to the Arkansas Supreme Court Committee on Professional Conduct for study and recommendation. The Committee responded on October 14, 1993, by filing its report with this Court.

"During this same time frame, this Court learned of pending litigation in the State of Florida involving similar issues. Because of this litigation, we deferred further consideration of the parties' petition until the Florida lawsuit was fully litigated and finalized. We advised the petitioner and our Committee accordingly.

"We have now learned that a federal district court has ruled that the Florida Bar's new rules on legal advertising and solicitation were unconstitutional and that the Florida Bar is now seeking certiorari from the United States Supreme Court. For this reason, we continue to defer further consideration of the petitioner's request until there has been a final resolution of the Florida case. The purpose of this Per Curiam is to advise the petitioner, our Committee and the bench and bar as to the status of these requested changes in our rules relating to professional conduct."

A proposed amendment to this rule was published by the Arkansas Supreme Court on February 19, 1998.

COMMENT

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them should be truthful. The prohibition in paragraph (b) of statements that may create "unjustified expecta-

tions" would ordinarily preclude advertisements about the results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation

that similar results can be obtained for others without reference to the specific factual and legal circumstances.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 2-101 provides that "A lawyer shall not ... use ... any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement of claim." DR 2-101(B) provides that a lawyer "may publish or broadcast ... the following information ... in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information ... complies with DR 2-101(A), and is presented in a dignified manner"

DR 2-101(B) then specifies 25 categories of information that may be disseminated. DR 2-101(C) provides that "Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forums may apply to (the agency having jurisdiction under state law) The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers."

RESEARCH REFERENCES

Ark. L. Rev. Schauer, *The Speech of Law and the Law of Speech*, 49 Ark. L. Rev. 687.

Rotunda, *Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc.*, 49 Ark. L. Rev. 703.

Florida Bar v. Went For It, Inc.: Does Ambulance-Chasing in Florida Justify Advertising Reform in Arkansas?, 49 Ark. L. Rev. 795.

Lawyer Advertising and the Dignity of the Profession, 59 Ark. L. Rev. 437.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written communication.

(b) A copy or recording of an advertisement or communication shall be kept for five years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertisements or communications permitted by this rule and may pay the usual charges for not-for-profit lawyer referral service or other legal service organization; and may pay for a law practice in accordance with Rule 1.17.

(d) Any communication made pursuant to this Rule shall include the name of at least one lawyer who is licensed in Arkansas and who is responsible for its content, and shall disclose the geographic location of the office or offices of the attorney or the firm in which the lawyer or lawyers who actually perform the services advertised principally practice law.

(e) Advertisements may include photographs, voices or images of the lawyers who are members of the firm who will actually perform the services. If advertisements utilize actors or other individuals, those persons shall be clearly and conspicuously identified by name and relationship to the advertising lawyer or law firm and shall not mislead or create an unreasonable expectation about the results the lawyer may be able to obtain. Clients or former clients shall not be used in any manner whatsoever in advertisements. Dramatization in any advertisement is prohibited.

COMMENT

[1] To assist the public in obtaining legal services, lawyers should be allowed to make known their services not only through reputation but also through organized information campaigns in the form of advertising. Advertising involves an active quest for clients, contrary to the tradition that a lawyer should not seek clientele. However, the public's need to know about legal services can be fulfilled in part through advertising. This need is particularly acute in the case of persons of moderate means who have not made extensive use of legal services. The interest in expanding public information about legal services ought to prevail over considerations of tradition. Nevertheless, advertising by lawyers entails the risk of practices that are misleading, overreaching, or unduly intrusive.

[2] This Rule permits public dissemination of information concerning a lawyer's name or firm name, address and telephone numbers; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

[3] Questions of effectiveness and taste in advertising are matters of speculation and subjective judgment. Some jurisdictions have had extensive prohibitions against television advertising, against advertising going beyond specified facts about a lawyer, or against "undignified" advertising. Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.

[4] Neither this Rule nor Rule 7.3 prohibits

communications authorized by law, such as notice to members of a class in class action litigation.

Record of Advertising

[5] Paragraph (b) requires that a record of the content and use of advertising be kept in order to facilitate enforcement of this Rule. It does not require that advertising be subject to review prior to dissemination. Such a requirement would be burdensome and expensive relative to its possible benefits, and may be of doubtful constitutionality.

Paying Others to Recommend a Lawyer

[6] A lawyer is allowed to pay for advertising permitted by this Rule, and for the purchase of a law practice in accordance with Rule 1.17, but otherwise is not permitted to pay another person for channeling professional work. This restriction does not prevent an organization or person other than the lawyer from advertising or recommending the lawyer's services. Thus, a legal aid agency or prepaid legal services plan may pay to advertise legal services provided under its auspices. Likewise, a lawyer may participate in not-for-profit lawyer referral programs and pay the usual fees charged by such programs. Paragraph (c) does not prohibit paying regular compensation to an assistant, such as a secretary, to prepare communications permitted by this Rule.

[7] Paragraph (e) of this Rule is designed to ensure that the advertising is not misleading and does not create unreasonable or unrealistic expectations about the results the lawyer may be able to obtain in any particular case, and to encourage a focus on providing useful information to the public about legal rights and needs and the availability and terms of legal services. Thus, the Rule allows all lawyer advertisements in which the lawyer personally appears to explain a legal right, the services the lawyer is available to perform, and the lawyer's background and experience. Regardless of medium, a lawyer's advertisement should provide only useful, factual information presented in a nonsensational manner.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to paragraph (a), DR 2-101(B) provided that a lawyer "may publish or broadcast, subject to DR 2-103, ... in print media ... or television or radio"

With regard to paragraph (b), DR 2-101(D) provided that if the advertisement is "communicated to the public over television or radio, ... a recording of the actual transmission shall be retained by the lawyer."

With regard to paragraph (c), DR 2-103(B) provided that a lawyer "shall not compensate or give anything of value to a person or organization to recommend or secure his employment ... except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D)." (DR 2-103(D) referred to legal aid and other legal services organizations.) DR 2-101(I) provided

that a lawyer "shall not compensate or give anything of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item."

There was no counterpart to paragraph (d) in the Model Code.

RESEARCH REFERENCES

Ark. L. Rev. Victor, "The Signs Are Very Ominous and a Chill Wind Blows: Recent Developments in Legal Advertising," 44 Ark. L. Rev. 123.

Killenbeck, Professionalism in the Balance?, 49 Ark. L. Rev. 671.

Schauer, The Speech of Law and the Law of Speech, 49 Ark. L. Rev. 687.

Rotunda, Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 Ark. L. Rev. 703.

Watkins, Lawyer Advertising, the Electronic Media, and the First Amendment, 49 Ark. L. Rev. 739.

Florida Bar v. Went For It, Inc.: Does Ambulance-Chasing in Florida Justify Advertising Reform in Arkansas?, 49 Ark. L. Rev. 795.

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Rule 7.3. Direct contact with prospective clients.

(a) A lawyer shall not solicit, by any form of direct contact, in-person or otherwise, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

(b) Notwithstanding the prohibitions described in Paragraph (a), a lawyer may solicit professional employment from a prospective client known to be in need of legal services in a particular matter by written communication. Such written communication shall:

(1) include on the bottom left hand corner of the face of the envelope the word "Advertisement" in red ink, with type twice as large as that used for the name of the addressee;

(2) only be sent by regular mail;

(3) not have the appearance of legal pleadings or other official documents;

(4) plainly state in capital letters "ADVERTISEMENT" on each page of the written communication;

(5) begin with the statement that "If you have already retained a lawyer, please disregard this letter";

(6) include the following statement in capital letters: "ANY COMPLAINTS ABOUT THIS LETTER OR THE REPRESENTATION OF ANY LAWYER MAY BE DIRECTED TO THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT, C/O CLERK, ARKANSAS SUPREME COURT, 625 MARSHALL STREET, LITTLE ROCK, ARKANSAS 72201"; and,

(7) shall comply with all applicable rules governing lawyer advertising.

(c) In death claims, the written communication permitted by paragraph (b) shall not be sent until 30 days after the accident.

(d) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.

(e) Even when otherwise permitted by this rule, a lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence; or

(3) the prospective client is known to the lawyer to be represented in connection with the matter concerning the solicitation by counsel, except where the prospective client has initiated the contact with the lawyer.

(f) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid group legal service plan operated by an organization not owned or directed by the lawyer which uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

COMMENT

[1] There is a potential for abuse inherent in direct in-person or live telephone contact by a lawyer with a prospective client known to need legal services. These forms of contact between a lawyer and a prospective client subject the lay person to the private importuning of the trained advocate in a direct interpersonal encounter. The prospective client, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult fully to evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon being retained immediately. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[2] This potential for abuse inherent in direct in-person or live telephone solicitation of prospective clients justifies its prohibition, particularly since lawyer advertising and written communication permitted under Rule 7.2 offer alternative means of conveying necessary information to those who may be in need of legal services. Advertising and written communications which may be mailed make it possible for a prospective client to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the prospective client to direct in-person or telephone persuasion that may overwhelm the client's judgment.

[3] The use of general advertising and written communications to transmit information from lawyer to prospective client, rather than direct in-person or live telephone contact, will help to assure that the information flows cleanly as well as freely. The contents of advertisements and communications permitted under Rule 7.2 are permanently recorded so that they cannot be disputed and may be shared with others who know the lawyer. This potential for informal review is itself likely to

help guard against statements and claims that might constitute false and misleading communications, in violation of Rule 7.1. The contents of direct in-person or live telephone conversations between a lawyer to a prospective client can be disputed and are not subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[4] There is far less likelihood that a lawyer would engage in abusive practices against an individual with whom the lawyer has a prior personal or professional relationship or where the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Consequently, the general prohibition in Rule 7.3(a) and the requirements of Rule 7.3(b) are not applicable in those situations.

[5] But even permitted forms of solicitation can be abused. Thus, any solicitation which contains information which is false or misleading within the meaning of Rule 7.1, which involves coercion, duress, harassment, fraud, overreaching, intimidation, or undue influence within the meaning of Rule 7.3(e)(2), or which involves contact with a prospective client who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(e)(1) is prohibited. Moreover, if after sending a letter or other communication to a client as permitted by Rule 7.2 the lawyer receives no response, any further effort to communicate with the prospective client may violate the provisions of Rule 7.3(e).

[6] Letters of solicitation and their envelopes should be clearly marked "Advertisement." This will avoid the recipient perceiving that he or she needs to open the envelope because it is from a lawyer or law firm, only to find he or she is being solicited for legal services. With the envelope and letter marked "Advertisement," the recipient can choose to

read the solicitation, or not to read it, without fear of legal repercussions.

[7] Paragraph (c) allows targeted mail solicitation of potential plaintiffs or claimants in wrongful death causes of action, but only if mailed at least thirty days after the incident. This restriction is reasonably required by the sensitized state of the potential clients who may be grieving the loss of a family member, and the abuses which experience has shown exist in this type of solicitation.

[8] In addition, the lawyer or law firm, should reveal the source of information used to determine that the recipient has a potential legal problem. Disclosure of the information source will help the recipient to understand the extent of knowledge the lawyer or law firm has regarding his or her particular situation and will avoid misleading the recipient into believing that the lawyer has particularized knowledge about the recipient's matter if the lawyer does not.

[9] Lawyers who use direct mail to solicit employment from accident victims or their survivors normally find the names of these persons, whom they believe may need legal services, in accident reports, newspaper reports, television or radio news, or other publicly available information. Some accident victims later die from their injuries after the preparation of reports and news dissemination. In the event of such a death, an attorney, who relies in good faith upon all the reasonably and publicly available information which creates the appearance the victim is still alive at the time the lawyer sends a letter soliciting employment, is not in violation of the prohibition against sending written communications within thirty days in cases which may be the basis of wrongful death claims.

[10] This Rule is not intended to prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not di-

rected to a prospective client. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[11] The requirement in Rule 7.3(b) that certain communications be marked "Advertisement" does not apply to communications sent in response to requests of potential clients or their spokespersons or sponsors. General announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client known to be in need of legal services within the meaning of this Rule.

[12] Paragraph (f) of this Rule would permit an attorney to participate with an organization which uses personal contact to solicit members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization referred to in paragraph (f) must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (f) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the in-person or telephone solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations also must not be directed to a person known to need legal services in a particular matter, but is to be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3(e). See 8.4(a).

CODE COMPARISON PRIOR TO 2005 REVISION

DR 2-104(A) provided with certain exceptions that "[a] lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that advice" The exceptions include DR 2-104(A)(1), which provided that a lawyer "may accept employment by a close friend, relative, former client (if the advice is ger-

mane to the former employment), or one whom the lawyer reasonably believes to be a client." DR 2-104(A)(2) through DR 2-104(A)(5) provided other exceptions relating, respectively, to employment resulting from public educational programs, recommendation by a legal assistance organization, public speaking or writing and representing members of a class in class action litigation.

RESEARCH REFERENCES

Ark. L. Rev. Victor, "The Signs Are Very Ominous and a Chill Wind Blows: Recent Developments in Legal Advertising," 44 Ark. L. Rev. 123.

Florida Bar v. Went For It, Inc.: Does Ambulance-Chasing in Florida Justify Advertising Reform in Arkansas?, 49 Ark. L. Rev. 795.

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Note, Supreme Court Upholds Thirty-Day Moratorium on Lawyers' Direct Mail Solicitation of Accident Victims, 19 U. Ark. Little Rock L.J. 131.

CASE NOTES

Cited: Union Nat'l Bank v. Barnhart, 308 Ark. 190, 823 S.W.2d 878 (1992), appeal dismissed sub nom. 316 Ark. 742, 875 S.W.2d 79 (1994).

Rule 7.4. Communication of fields of practice and specialization.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.

(d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and

(2) the name of the certifying organization is clearly identified in the communication.

(e) [Transitional Provisions (December 31, 2002 — December 31, 2005)]

(1) A lawyer who is currently certified as a Board Recognized Specialist in Tax Law under the Arkansas Plan of Specialization may communicate such fact through December 31, 2005.

(2) The Arkansas Legal Specialization Transition Task Force shall discharge any administrative, supervisory, or other duties previously discharged by the Board of Legal Specialization or the Tax Speciality Committee that may arise during the transition period. No new specialists shall be recognized under the Arkansas Plan of Specialization.

COMMENT

[1] Paragraph (a) of this Rule permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. A lawyer is generally permitted to state that the lawyer is a "specialist," practices a "specialty," or "specializes in" particular fields, but such communications are subject to the

"false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[2] Paragraph (b) recognizes the long-established policy of the Patent and Trademark Office for the designation of lawyers practicing before the Office. Paragraph (c) recognizes that designation of admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.

[3] Paragraph (d) permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate state authority or accredited by the American Bar Association or another organization, such as a state bar association, that has been approved by the state authority to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty

area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to insure that a lawyer's recognition as a specialist is meaningful and reliable. In order to insure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 2-105(A) provides that "A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice ... except as follows:

"(1) A lawyer admitted to practice before the United States Patent and trademark Office may use the designation 'Patents,' 'Patent Attorney,' 'Patent Lawyer,' or 'Registered Patent Attorney' or any combination of those terms, on his letterhead and office sign.

"(2) A lawyer who publicly discloses fields of law in which the lawyer ... practices or states his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by the agency having jurisdiction of the subject under state law.

"(3) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such, but only in accordance with the rules prescribed by that authority."

EC 2-14 states that "In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been permitted."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

Rule 7.5. Firm names and letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.

(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

(d) Lawyers shall not state or imply that they practice in a partnership, association or other organization unless that is the fact.

COMMENT

[1] A firm may be designated by the names of all or some of its members, by the names of deceased members where there has been a continuing succession in the firm's identity or by a trade name such as the "ABC Legal Clinic." A lawyer or law firm may also be designated by a distinctive website address or comparable professional designation. Although the United States Supreme Court has held that legislation may prohibit the use of trade names in professional practice, use of such names in law practice is acceptable so long as it is not misleading. If a private firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express disclaimer that it is a public legal aid agency may be required to avoid a misleading implication. It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm.

[2] With regard to paragraph (d), lawyers

sharing office facilities, but who are not in fact associated with each other in a law firm, may not denominate themselves as, for example, "Smith and Jones," for that title suggests that they are practicing law together in a firm.

[3] The addition of the words "and associates" following the name of a lawyer in a firm name implies to the public that three or more lawyers are practicing law together in a firm. In a law firm context "associate" has come to mean a lawyer employed with or connected with a firm who usually is not a partner. "Associates" is not a proper term to use in a firm name to mean nonlawyer assistants such as secretaries, investigators, law student interns, and paraprofessionals. In using a firm name, a solo practitioner shall not use a title such as "Smith and Associates" as a firm name. If only two lawyers are practicing law together in a firm the singular word "associate" may be used in the firm name with the name of one of the lawyers. If three or more lawyers are practicing law together in a firm the plural word "associates" may be used in the firm name with the name of one of the lawyers.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 7.5(a), DR 2-102(B) provides that "A lawyer ... shall not use ... professional cards ... letterheads, or similar professional notices or devices, ... (except) if they are in dignified form ... (and are limited to information) permitted under DR 2-105" DR 2-102(B) provides that "A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that ... a firm may use as ... its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession."

With regard to Rule 7.5(b), DR 2-102(D) provides that "A partnership shall not be

formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction."

With regard to Rule 7.5(c), DR 2-102(B) provides that "A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm ... during any significant period in which he is not actively and regularly practicing law as a member of the firm...."

Rule 7.5(d) is substantially identical to DR 2-102(C).

MAINTAINING THE INTEGRITY OF THE PROFESSION**Rule 8.1. Bar admission and disciplinary matters.**

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

- (a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

COMMENT

[1] The duty imposed by this Rule extends to persons seeking admission to the bar as well as to lawyers. Hence, if a person makes a material false statement in connection with an application for admission, it may be the basis for subsequent disciplinary action if the person is admitted, and in any event may be relevant in a subsequent admission application. The duty imposed by this Rule applies to a lawyer's own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct. Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirma-

tive clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.

[2] This Rule is subject to the provisions of the fifth amendment of the United States Constitution and corresponding provisions of state constitutions. A person relying on such a provision in response to a question, however, should do so openly and not use the right of nondisclosure as a justification for failure to comply with this Rule.

[3] A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including Rule 1.6 and, in some cases, Rule 3.3.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 1-101(A) provides that "A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar." DR 1-101(B) provides that "A lawyer shall not further the applica-

tion for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute." With respect to paragraph (b) of Rule 8.1, DR 1-102(A)(5) provides that "a lawyer shall not engage in conduct that is prejudicial to the administration of justice."

Rule 8.2. Judicial and legal officials.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the code of judicial conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 8.2(a), DR 8-102(A) provides that "A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office." DR 8-102(B)

provides that "A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer."

Rule 8.2(b) is substantially identical to DR 8-103.

CASE NOTES

Disqualification.

Counsel for the appellant was not subject to disqualification on the basis that the rule requires a lawyer who is a candidate for judicial office to comply with the Code of Judicial Conduct and that Canon 4(G) of the Code provides that a judge shall not practice

law or appear as counsel in any court in the State. *Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998).

Cited: *Beshear v. Butt*, 773 F. Supp. 1229 (E.D. Ark. 1991), rev'd 966 F.2d 1458 (8th Cir. 1992).

Rule 8.3. Reporting professional misconduct.

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) This rule shall not apply to a member or employee of the Lawyer Assistance Committee ("the Committee") of the Arkansas Judges and Lawyers Assistance Program (JLAP) or volunteer serving pursuant to Rule 4 of the Rules of JLAP regarding information received in one's capacity as a Committee member, employee, or volunteer. However, the "duty to report" outlined in paragraphs (a) and (b) above is reinstated if, in good faith, the JLAP committee member, employee, or volunteer, has: reason to believe that an attorney participating in the JLAP program is failing to cooperate with said program; is engaged in criminal behavior or the threat thereof; or, is otherwise in violation of paragraphs (a) and (b) of this rule which is beyond or succeeds the behavior upon which the attorney's participation in JLAP was initially based. (Amended April 1, 2010.)

COMMENT

[1] Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct. Lawyers have a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage

a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

[3] If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the serious-

ness of the possible offense and not the quantum of evidence of which the lawyer is aware. A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances. Similar considerations apply to the reporting of judicial misconduct.

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

[5] Information about a lawyer's or judge's

misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

CODE COMPARISON PRIOR TO 2005 REVISION

DR 1-103(A) provides that "A lawyer possessing unprivileged knowledge of a violation of a Disciplinary Rule shall report such knowledge to ... authority empowered to investigate or act upon such violation."

Cross References. Assistance for lawyers with substance abuse problems, Arkansas Lawyers' Assistance Program Rules.

CASE NOTES

Report Held Improper.

District court properly rejected lawyer's explanation that he filed ethics complaint against opposing lawyer in compliance with

this rule, and in finding instead lawyer's ethics complaint reflected a personal vendetta. *Landscape Properties, Inc. v. Whisenhunt*, 127 F.3d 678 (8th Cir. 1997).

Rule 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the rules of professional conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official; or to achieve results by means that violate the Rules of Professional Conduct or other law; or
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as

offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the en-

tire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a lawyer while performing duties in connection with the practice of law. The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute. Such discriminatory conduct, when directed towards litigants, jurors, witnesses, other lawyers, or the court, including race, sex, religion, national origin, or any other similar factors, subverts the administration of justice and undermines the public's confidence in our system of jus-

tice, as well as notions of equality. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. This subdivision does not prohibit a lawyer from representing a client accused of committing discriminatory conduct.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

CODE COMPARISON PRIOR TO 2005 REVISION

With regard to Rule 8.4(a)-(d) DR 1-102(A) provides that "A lawyer shall not:

"(1) Violate a Disciplinary Rule.

"(2) Circumvent a Disciplinary Rule through actions of another.

"(3) Engage in illegal conduct involving moral turpitude.

"(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

"(5) Engage in conduct that is prejudicial to the administration of justice.

"(6) Engage in any other conduct that adversely reflects on his fitness to practice law."

Rule 8.4(e) is substantially similar to DR 9-101(C).

There is no direct counterpart to Rule 8.4(f) in the Disciplinary Rules of the Code. EC 7-34 states in part that "A lawyer ... is never justified in making a gift or a loan to a judicial officer except as permitted by ... the Code of Judicial Conduct." EC 9-1 states that "A lawyer should promote public confidence in our legal system and in the legal profession."

RESEARCH REFERENCES

ALR. Disciplining Attorney for Abuse or Misuse of Computer Technology, Including Internet and E-Mail Activities. 46 ALR 6th 365.

Ark. L. Rev. Comment. To the Spoliator Go the Spoils: Arkansas Rejects Spoliation of Evidence as a Tort Cause of Action, 61 Ark. L. Rev. 283.

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ANALYSIS

In general.
Appeal.
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Dishonesty, fraud, deceit or misrepresentation.
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Prejudicial to administration of justice.
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In General.

Former attorney failed to meet his burden of establishing eligibility for reinstatement under Bar Adm. Rule XIII where the conduct for which he was convicted involved dishonesty, breach of trust, serious interference with the administration of justice and undermined the confidence of the public in the system of justice and the legal profession. In re Lee, 305 Ark. 196, 806 S.W.2d 382 (1991).

Where an attorney admitted he was incompetent in bankruptcy matters and yet filed several motions and complaints, engaged in multiple hearings in that forum without the requisite competence, where his behavior was continually insulting, abusive, and disruptive to the court, to witnesses, and to opposing counsel despite repeated warnings, his allegations were not founded in fact according to his own admission, and apparently were brought for the purposes of harassment and intimidation, a one-year suspension was not unduly severe. *Dodrill v. Executive Dir.*, 308 Ark. 301, 824 S.W.2d 383 (1992).

Appeal.

Although the committee is not bound by rules of the court and is not required to strictly adhere to the rules of evidence or the rules of procedure during a hearing conducted pursuant to former section 5F. of the Procedures Regulating Professional Conduct, it would have been appropriate and most helpful for the committee to have made findings, similar to those required by ARCP 52, as to attorney's conduct which was prejudicial to the administration of justice in violation of subsection (d) of this rule; by doing so, the attorney would have understood the committee's actions and the Supreme Court would have been in a better position to evaluate the committee's findings in its *de novo* review. *Finch v. Neal*, 316 Ark. 530, 873 S.W.2d 519 (1994).

Disbarment.

Section 6B.(1) of the Procedures Regulating Professional Conduct requires the Committee on Professional Conduct to institute a disbarment action when the complaint against an attorney is based on a conviction of a felony or a criminal act that, under the terms of subsection (b) of this rule, reflects adversely on the attorney's "honesty, trustworthiness or fitness as a lawyer in other respects." *Neal v. Wilson*, 316 Ark. 588, 873 S.W.2d 552 (1994).

Attorney was disbarred for misconduct where (1) he applied a \$2600 client payment to his fee rather than the payment of court costs, (2) another client gave the attorney a \$500 check that the attorney cashed without reporting it to his firm, (3) the attorney's secretary prepared a \$1,000 check made payable to a car dealership and a \$500 check made payable to the client, and the attorney signed the client's name to the check and cashed it, and (4) when contacted by a client about a missing \$500 in restitution, the firm sent the client a check from the firm's trust account for \$1,500, but the firm's trust account was then overdrawn by \$500. *Ligon v. Newman*, 365 Ark. 510, 231 S.W.3d 662 (2006).

Attorney was disbarred as he misappropriated client funds for his own use and took

fluids from clients as fees for work that was never done, which constituted serious misconduct under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(1), (3) and (4) as misappropriation, dishonesty or fraud, and a pattern of similar misconduct. Further, the attorney's prior record of public sanctions demonstrated a substantial disregard of the lawyer's professional duties and responsibilities under Ark. Sup. Ct. P. Reg. Prof'l Conduct § 17(B)(5); the attorney not only failed to provide services promised, he misled clients about the status of their cases and failed to apprise them when the case was dismissed through his own misconduct. *Ligon v. McCullough*, — Ark. —, 303 S.W.3d 78, 2009 Ark. LEXIS 229 (2009).

Dishonesty, Fraud, Deceit or Misrepresentation.

In the attorney's disciplinary proceeding, the Executive Director of the Arkansas Supreme Committee on Professional Conduct failed to prove that there was a violation of subsection (c) of this rule in count VIII because it failed to demonstrate that the attorney knew at the time that he wrote a check for his personal loan that he did not have that amount in personal funds in his IOLTA account. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

Suspension of the attorney's license to practice law was appropriate because he violated Ark. R. Prof. 3.4(c) and subsection (c) of this rule when he when he lied during a deposition by stating that he had not represented a client in any other matters when he actually had represented the client in a criminal matter and several real estate transactions. *Ligon v. Dunklin*, 368 Ark. 443, 247 S.W.3d 498 (2007).

Misdemeanor Offenses.

Where attorney was convicted of five counts of "knowingly" converting money and property that belonged to the federal government in violation of 18 U.S.C. §§ 641 and 658, these convictions, although misdemeanors, reflected adversely on his ability to practice law and violated this rule. *Wilson v. Neal*, 332 Ark. 148, 964 S.W.2d 199 (1998).

Prejudicial to Administration of Justice.

Where attorney drafted a proposed child support order, circumvented the mother and her counsel, and negotiated a settlement of these proceedings with the enforcement agency without the benefit of input from either party, conduct was prejudicial to the administration of justice in violation of subsection (d) of this rule. *Finch v. Neal*, 316 Ark. 530, 873 S.W.2d 519 (1994).

Sanction upheld where a series of errors, whether intentional or not, moved beyond mere negligence and entered the realm of harassment and intimidation, and rendered

the conduct prejudicial to the administration of justice. *Fink v. Neal*, 328 Ark. 646, 945 S.W.2d 916 (1997).

Counsel for appellant would be disqualified on the basis that conduct by the appellant and its counsel was prejudicial to the administration of justice where they contrived a series of events in an attempt to force the judge to recuse in the case after counsel announced his candidacy for the judge's judicial position and then entered an appearance for the appellant. *Seeco, Inc. v. Hales*, 334 Ark. 134, 969 S.W.2d 193 (1998).

Suspension.

A suspension from the practice of law for five years, rather than disbarment, was appropriate for an attorney who pleaded guilty to two federal misdemeanor counts in connection with the Whitewater investigation and served 14 months in federal custody. *Neal v. Matthews*, 342 Ark. 566, 30 S.W.3d 92 (2000).

Suspension for three months and an award of costs of \$50 was upheld where attorney failed to timely file a notice of appeal in a criminal matter. *Gillaspie v. Ligon*, 357 Ark. 50, 160 S.W.3d 332 (2004).

Arkansas Committee on Professional Conduct Panel found that attorney's failure to maintain the proper balance in the trust account and his apparent personal use of trust funds in certain cases constituted con-

version in violation of subsection (c) of this rule; further, the attorney's actions constituted serious misconduct and a suspension was required, rather than a mere reprimand. *Comm. on Prof'l Conduct v. Revels*, 360 Ark. 69, 199 S.W.3d 630 (2004).

Violation Upheld.

Attorney violated subsection (d) of this rule and Ark. R. Prof. 1.1 and 1.3 where he essentially ignored his plaintiff-clients' case for nearly two years after the defendant's motion to dismiss was filed, and, although he suggested the plaintiffs should obtain another attorney he continued to "work" on the matter and discussed his "progress" with them. *Clark v. Supreme Court Comm. on Professional Conduct*, 320 Ark. 597, 898 S.W.2d 446 (1995).

Cited: *Drayton v. State*, 23 Ark. App. 1, 740 S.W.2d 147 (1987); *Sexton v. Supreme Court Comm. on Professional Conduct*, 295 Ark. 141, 747 S.W.2d 94 (1988); *Fitzhugh v. Committee on Professional Conduct*, 308 Ark. 313, 823 S.W.2d 896 (1992); *In re Anderson*, 312 Ark. 447, 851 S.W.2d 408 (1993); *Kearney v. Committee on Professional Conduct*, 320 Ark. 581, 897 S.W.2d 573 (1995); *In re Haley*, 60 F. Supp. 2d 926 (E.D. Ark. 1999); *Wilson v. Neal*, 341 Ark. 282, 16 S.W.3d 228 (2000), cert. denied 532 U.S. 919, 121 S. Ct. 1355, 149 L. Ed 2d 285 (2001); *Todd v. Ligon*, 356 Ark. 187, 148 S.W.3d 229 (2004).

Rule 8.5. Disciplinary authority; choice of law.

(a) *Disciplinary Authority.* A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) *Choice of Law.* In any exercise of the disciplinary authority of this jurisdiction, the Rules of Professional Conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

COMMENT

Disciplinary Authority

[1] It is longstanding law that the conduct of a lawyer admitted to practice in this juris-

diction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other

lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints the Clerk of the Arkansas Supreme Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

Choice of Law

[2] A lawyer may be potentially subject to more than one set of Rules of Professional Conduct which impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. Additionally, the lawyer's conduct may involve significant contacts with more than one jurisdiction.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

[4] Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding in pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise. As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

[5] When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.

[6] If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

[7] The choice of law provision applies to lawyers engaged in transnational practice, unless international law, treaties or other agreements between competent regulatory authorities in the affected jurisdictions provide otherwise.

CODE COMPARISON PRIOR TO 2005 REVISION

There is no counterpart to this Rule in the Code.

RESEARCH REFERENCES

ALR. Reciprocal Discipline of Attorneys — Criminal Conduct. 43 ALR 6th 163.

Reciprocal Discipline of Attorneys — Non-criminal Misconduct Towards Clients Not Involving Client Funds. 44 ALR 6th 75.

Reciprocal Discipline of Attorneys — Commingling or Other Mishandling of Client Funds. 45 ALR 6th 175.

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THE HISTORY OF THE

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BY

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RULES OF THE ARKANSAS JUDGES AND LAWYER ASSISTANCE PROGRAM

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Publisher's Notes. These rules and the concomitant amendments to Rule 8.3 of the Arkansas Rules of Professional Conduct and

Canon 3 of the Arkansas Code of Judicial Conduct became effective January 1, 2001.

Rule 1. Scope of Program.

(A) *Establishment.* There is hereby established a statewide lawyer assistance program to be known as Arkansas Judges and Lawyer Assistance Program (JLAP) which shall provide immediate and continuing help to lawyers and judges (hereinafter "members of the legal profession") as well as students attending the University of Arkansas at Fayetteville School of Law and the UALR Bowen School of Law, who suffer from physical or mental disabilities that result from disease, substance abuse, disorder, trauma, or age and that might impair their ability to practice or serve.

(B) *Purpose.* JLAP has three purposes:

(1) to protect the interests of clients, litigants, and the general public from harm caused by impaired lawyers or judges;

(2) to assist impaired members of the legal profession to begin and continue recovery; and

(3) to educate the bench and bar to the causes of and remedies for impairments affecting members of the legal profession.

(C)(1) *Funding and Administration.* The Supreme Court of Arkansas shall collect annually and remit to JLAP a fifteen dollar (\$15.00) annual fee from every attorney for the purpose of funding this program.

(2) Funding for JLAP may also include gifts or bequests from any source and earnings on investments of the JLAP fund. (Adopted January 1, 2001; amended November 11, 2010.)

Rule 2. JLAP Committee.

(A) *Members.* The Arkansas Supreme Court shall appoint committee members to administer the JLAP. Officers of the committee shall consist of

a chair, vice chair, and secretary/treasurer. The chair shall be appointed by the Supreme Court. Each of the other officers shall be elected by the members of the committee annually.

(B) *Composition.* The committee shall consist of nine (9) members, chosen on the basis of geography and diversity and shall include three (3) citizens who are not members of the legal profession. The members shall have diverse experience, knowledge and shall have demonstrated competence in the problems of addiction and other common difficulties that impair members of the legal profession.

(C) *Terms.* Each appointment shall be for a term of six years, unless otherwise designated by the Supreme Court. Members may not be appointed to successive six-year terms. Terms shall be staggered. Vacancies occurring from causes other than expiration of term of office will be filled by the Supreme Court as they occur, and the person so appointed shall serve the remainder of the term of his or her predecessor. Members shall continue to serve beyond their designated term until such time as their successor is qualified and appointed by the Court.

(D) *Duties of the Committee.* The committee shall have the following powers and duties:

(1) To establish JLAP policy and procedures consistent with the purposes of this program. Such policies and procedures shall be established after reasonable notice to the Arkansas bench and bar and opportunity for comment.

(2) To operate the program to achieve its purposes.

(3) To assure the duties listed under Rule 3 are carried out in the absence of a director of the program.

(4) To establish and administer a revolving loan fund as provided under Rule 9.

(5) To make reports to the Arkansas Supreme Court annually or as otherwise required.

(E) *Meetings.* The committee shall meet quarterly, upon call of the chair or upon the request of five (5) or more members. (Adopted January 1, 2001.)

Publisher's Notes. Subdivision (D)(1) of this rule directs the ALAP Committee to establish policies and procedures after reasonable notice to the bench and the bar. Proposed changes to the Procedure Manual were published for comment on January 10, 2008, and were approved as published on February 28, 2008 (further amended April 1, 2010). The Procedure Manual, edited for punctuation by the Publisher, provides:

"Arkansas Judges and Lawyers Assistance Program"

"Procedure Manual"

"**FORWARD** The Arkansas Supreme Court established the Arkansas Lawyers Assistance Program (JLAP) as a program which assists and supports judges and lawyers in overcoming physical or mental disabilities that result from disease, substance abuse, disorder, trauma, or age that impair their ability to practice or serve (impairments). The Arkansas Lawyers Assistance Program Committee

(Committee) was appointed by the Arkansas Supreme Court to fulfill the purposes of the program, which are:

"to protect the interests of clients, litigants, and the general public from the harm caused by impaired judges and lawyers;

"to assist impaired members of the legal profession to begin and continue to recover; and,

"to educate the bench and bar to the causes of and remedies for impairment affecting members of the legal profession.

"The Committee shall develop the necessary documents to administer the program. This Procedure Manual will replace the previous manual adopted by per curiam order of this Court on December 31, 2001. To more properly reflect the population served by the program, throughout the new manual the program is designated Arkansas Judges and Lawyers Assistance Program (JLAP).

"**1. BACKGROUND.** The Arkansas Judges and Lawyers Assistance Program (JLAP) was

established by the Arkansas Supreme Court to be effective January 1, 2001. The Court appointed nine (9) committee members, including three (3) citizens who are not members of the legal profession. The members have diverse experience, knowledge and a demonstrated competence in the physical and mental health conditions that negatively affect a lawyer or judge in the practice of their profession and quality of life.

"The Court appoints the Chair of the Committee. The powers and duties of the Committee are:

"to establish Arkansas JLAP policies and procedures consistent with the purposes of the program;

"to oversee the management of the program to achieve the stated purposes; and,

"to assure the implementation of the Arkansas JLAP program in compliance with the Arkansas Supreme Court per curiam Order of December 7, 2000.

"The procedures and policies set forth in this manual are cumulative to and explanatory of the per curiam order of December 7, 2000. In the event of conflict between these procedures and the per curiam order, the provisions of the per curiam order shall prevail.

"2. PROGRAM GOALS AND GUIDING PRINCIPLES Arkansas JLAP's program goals are:

"1. To identify the impaired lawyer or judge who is practicing in the state of Arkansas;

"2. To assist judges and lawyers in their personal recovery from physical or mental health conditions that affect competent practice of their profession and their quality of life;

"3. To assist the families of judges and lawyers during their personal recovery from identified physical or mental health conditions;

"4. To educate the legal community on identification, assessment, referral, treatment, and community based resources available to meet the needs of affected judges and lawyers;

"5. To monitor and assist judges and lawyers while they return to the practice of law or to the bench; and,

"6. To establish and maintain a cooperative relationship with the legal community.

"Arkansas JLAP's guiding principles are:

"1. The program is motivated by humanitarian concern for the public and legal community;

"2. Addiction, mental health concerns, physical disabilities and aging are treatable conditions;

"3. Addiction, mental health concerns, physical disabilities and aging should not be ignored or left untreated;

"4. Impaired judges and lawyers are obligated to seek assistance and to participate in

services necessary to renew their full effectiveness as a lawyer, judge and family member; and,

"5. Every licensed lawyer and judge has the ethical responsibility to recognize the signs and symptoms of a colleague who might be impaired and to assist the colleague in accessing appropriate services.

"3. CLINICAL DEFINITIONS The following definitions are used by the Arkansas JLAP Committee and Staff for clarity and consistency:

"Active Participant - A person who continues to make contact and cooperate with Arkansas JLAP staff;

"Inactive Participant - A person who has made contact (self-referral or referred by another party), but has ceased to make further contact over a 12 month period of time;

"Non-Participant - A referral has been received from another party, but after investigation the referred person is deemed not appropriate for Arkansas JLAP engagement or contact had been made and the referral had not cooperated;

"Pending - A referral for a person has been received, information is being gathered, no direct contact with potential participant has occurred;

"Compliant - The participant is following the recommendations of the Arkansas JLAP staff and Arkansas JLAP contract;

"Noncompliant - The participant has failed to follow the recommendations of the Arkansas JLAP staff or has chose to no longer access services of Arkansas JLAP;

"Transitional - The participant is transitioning out of Arkansas JLAP as the result of loss of licensure; and,

"Trauma - Negative stresses not specifically identified in the per curiam as alcohol, drug abuse, mental health, physical disability or aging (i.e., stress, time management, financial issues, codependency).

"4. COMMITTEE GUIDELINES The following are guidelines used by the Arkansas JLAP Committee and staff when contact is initiated:

"A. SELF-REFERRALS

"1. Any licensed lawyer or judge may voluntarily self-refer;

"2. Basic information will be taken by telephone or in person to establish appropriateness for services;

"3. Arkansas JLAP staff meets with the lawyer or judge as soon as possible. The lawyer is encouraged to accept personal responsibility for his or her treatment process and recovery;

"4. A clinical assessment is conducted by a licensed professional;

"5. Treatment options are discussed and referrals made as appropriate; and,

"6. The participant is offered the opportunity to participate in a health monitoring program to assure compliance with treatment goals.

"B. REFERRALS OF SUSPECTED IMPAIRMENT

"1. No anonymous referrals are accepted by the Arkansas JLAP Committee or staff;

"2. Referrals are accepted when the ability of a lawyer or judge to practice and serve are challenged and are expressed by a concerned party;

"3. Referrals are accepted from any individual who has observed behaviors indicating impairment or have information that may place public health, welfare, or safety at risk;

"4. Basic information will be taken by telephone or in person from the referral source to establish 'pending status';

"5. Arkansas JLAP staff meets with the lawyer or judge as soon as possible. The lawyer is encouraged to accept personal responsibility for his or her treatment process and recovery;

"6. A clinical assessment is conducted by a licensed professional;

"7. Treatment options are discussed and referrals made as appropriate; and,

"8. The participant is offered the opportunity to participate in a health monitoring program to assure compliance with treatment goals.

"C. REFERRALS FROM DISCIPLINARY AUTHORITIES Referrals are accepted for judges and lawyers under investigative, provisional, or probationary status with the Arkansas Professional Conduct Committee, the Arkansas Judicial Discipline and Disability Commission or any disciplinary agency with disciplinary authority.

"D. INVESTIGATION OF SUSPECTED IMPAIRMENT

"1. The objective of investigating suspected impairment of a lawyer or judge is to gather accurate information from individuals who have concern for the health of the lawyer or judge. All efforts to gather information are discrete and confidential;

"2. When an investigation produces insufficient indication of impairment, the lawyer or judge is classified as 'non-participant status' but the file is maintained indefinitely should new information be obtained;

"3. When impairment is confirmed, an intervention is planned and conducted with Arkansas JLAP staff. Intervention planning and implementation use techniques designed to assist the lawyer or judge to acknowledge personal responsibility for initiating treatment and becoming responsible for their recovery and other necessary behavioral changes;

"4. Treatment options are discussed and referrals made as appropriate; and,

"5. The participant is offered the opportunity to participate in a health monitoring program to assure compliance with treatment goals.

"E. HEALTH MONITORING CONTRACTS A Health Monitoring Contract is a tool for maintaining treatment goals. Both addiction and mental health contracts monitor the participant's personal responsibility for achieving the desired goals and provide documentation of the accomplishments. Health Monitoring Contracts are individualized for each participant and are maintained for a minimum of three (3) years. Quarterly meetings with Arkansas JLAP staff verify compliance and serve as an ongoing supportive tool for the participating lawyer or judge.

"5. ADDITIONAL SERVICES Arkansas JLAP provides support services for family members, friends, colleagues or others who are potential participants in an intervention. These services may include motivational services to learn techniques and self-care during the recovery process of the participant.

"6. REPORTING OF STATISTICAL INFORMATION Statistical information consisting of status; compliance; referral source; nature of impairment; gender; and geographic location are compiled by Arkansas JLAP staff. No individually identifying information is included in the statistical information. Statistical information is provided to the Arkansas Supreme Court annually. Statistical information is maintained indefinitely.

"7. TRANSITIONAL SERVICES To provide competent clinical care to Arkansas JLAP participants two issues regarding transitional services are provided:

"Abandonment Prohibited: Licensed health care professionals do not abandon or neglect clients in counseling. Counselors assist in making appropriate referral arrangements for the continuation of treatment, when necessary, during interruptions such as vacations and following termination of services; and,

"Disbarment: Should an Arkansas JLAP participant be disbarred during the course of treatment, the Arkansas JLAP staff will continue to provide transitional services consistent with the requirements of their professional licensing board with regards to proper termination of services. No lawyer or judge shall be refused services during disbarment proceedings or until transitional services have been accomplished.

"8. FILE RETENTION To be compliant with standards for licensed mental health professionals in the State of Arkansas paper files for all participants will be maintained for seven (7) years from the date services were terminated. The minimum data required by licensed mental health professionals in the state of Arkansas will be retained. All unne-

essary information to meet retention requirements will be shredded.”

Rule 3. Director of the Program.

(A) *Appointment/Hire.* The committee shall hire the JLAP director with the consent of the Supreme Court, and the director shall serve at the pleasure of the Court. The committee shall oversee and supervise the work of the director.

(B) *Qualifications.* The director shall have sufficient experience and training to enable the director to identify and assist impaired members of the legal profession and to work well with the volunteers.

(C) *Duties and Responsibility.* The director shall:

(1) Provide initial response to help-line calls.

(2) Help lawyers, judges, law firms, courts, and others to identify and intervene with impaired members of the legal profession.

(3) Help members of the legal profession and their families to secure expert counseling and treatment for chemical dependency and other illnesses, maintaining current information on available treatment services, both those that are available without charge as well as paid services.

(4) Establish and maintain regular contact with other bar associations, agencies, and committees that serve either as sources of referral or resources in providing help.

(5) Establish and oversee monitoring services with respect to recovery of members of the legal profession for whom monitoring is appropriate under Rules 5(E) or 7.

(6) Plan and deliver educational programs for the legal community with respect to all sources of potential impairment as well as treatment and preventative measures.

(7) Provide information about JLAP services to members of the legal profession and their families.

(8) Recruit, select, train, and coordinate the activities of volunteers.

(9) Investigate other potential sources of income pursuant to Rule 1(C)(2). (Adopted January 1, 2001.)

Rule 4. Volunteers.

The program shall enlist volunteers whose responsibility may include:

(A) assisting in interventions planned by JLAP;

(B) acting as twelve-step program sponsors;

(C) acting as a contact between JLAP and courts, bar organizations, and local committees;

(D) providing compliance monitoring when appropriate; or

(E) performing any other function deemed appropriate and necessary by the committee to fulfill its purposes. (Adopted January 1, 2001; amended April 1, 2010.)

Rule 5. Services.

JLAP shall provide the following services:

(A) immediate and continuing assistance to members of the legal profession who suffer from physical or mental disabilities that result from disease, substance abuse disorder, trauma, or age and that impair their ability to practice;

(B) planning and presentation of educational programs to increase the awareness and understanding of members of the legal profession to recognize problems in themselves and in their colleagues; to identify the problems correctly; to reduce stigma; and, to convey an understanding of appropriate ways of interacting with affected individuals;

(C) investigation, planning, and participation in interventions with members of the legal profession in need of assistance;

(D) aftercare services upon request, by order, or under contract that may include the following: assistance in structuring aftercare and discharge planning; assistance for entry into appropriate aftercare and professional peer support meetings; and assistance in obtaining a primary care physical or local peer counselor; and

(E) monitoring services under Rule 7 or under contract that may include the following: alcohol and/or drug screening programs; tracking aftercare, peer support and twelve-step meeting attendance; providing documentation of compliance; and providing such reports concerning compliance by those participating in a monitoring program as may be required by the terms of that program. (Adopted January 1, 2001.)

Rule 6. Referrals.

(A) *Self-referral.* Any member of the legal profession may seek assistance from JLAP.

(B) *Other Referrals.* JLAP shall receive referrals concerning any member of the legal profession from family members, colleagues, friends, law firms, or any other source. (Adopted January 1, 2001.)

Rule 7. Referrals from the Professional Conduct Committee, Judicial Discipline and Disability Commission, or Other Disciplinary Agencies.

(A) *Referrals.* JLAP may accept referral of lawyers or judges under investigational, provisional, or probational status with the Arkansas Professional Conduct Committee, Arkansas Judicial Discipline and Disability Commission, or any disciplinary agency with disciplinary authority.

(B) *Progress Reports.* When JLAP accepts a referral under Rule 7(A), JLAP shall provide progress reports or reports of non-compliance. Notwithstanding Rule 10, these reports may be used as evidence in any proceeding or appeal relating to such referral from the Arkansas Professional Conduct Committee, the Arkansas Judicial Discipline and Disability Commission, or a disciplinary agency with disciplinary authority. (Adopted January 1, 2001.)

Rule 8. Cooperation with Local Bar Programs.

JLAP shall coordinate its activities with local impaired lawyer programs. (Adopted January 1, 2001.)

Rule 9. Revolving Loan Fund.

From the funds received under Rule 1, JLAP may establish a revolving loan fund. Such fund shall be made available to impaired lawyers and judges under rules and regulations established by the Committee, as a low interest loan for the purposes of defraying the cost of treatment. (Adopted January 1, 2001; amended January 29, 2004.)

Rule 10. Confidentiality; Duty to Report; Immunity.

Information and actions taken by JLAP shall be held in the strictest confidence and shall not be disclosed or required to be disclosed to any person or entity outside of JLAP, unless such disclosure is authorized by the member of the legal profession to whom it relates or as provided in Rule 7(B) hereof. Such information and actions shall be excluded as evidence in any complaint, investigation, or proceeding before the Arkansas Professional Conduct Committee, the Arkansas Judicial Discipline and Disability Commission, or their successor entities.

No information received, gathered, or maintained by the Committee, its members or volunteers, or by an employee of JLAP in connection with the work of the Committee may be disclosed to any person or be subject to discovery or subpoena in any administrative or judicial proceeding, except upon the express written release of the subject attorney. However, the Committee may refer an attorney to a professional assistance entity, and may, in good faith, communicate information to the entity in connection with the referral. If information obtained by a member of the Committee, a volunteer, or an employee of JLAP gives rise to reasonable suspicion of a direct threat to the health or safety of the subject attorney or other person, then the obligation of confidentiality set forth in this subsection shall not apply, and the Committee member, volunteer, or JLAP employee may make such communications as are necessary for the purpose of avoiding or preventing said threat. Further, JLAP Committee members, employees, or volunteers, who, as licensed health care professionals are mandated reporters pursuant to Arkansas statutes, may make such communications as are required by law.

Lawyers who are committee members, employees, or volunteers recruited under Rule 4 are relieved of the duty of disclosure of information to authorities as imposed by Rule 8.3 of the *Arkansas Rules of Professional Conduct*. Nonetheless, the duty to disclose certain information may be reinstated as set out in Section (d) of Rule 8.3 of those rules. Judges who are committee members or volunteers recruited under Rule 4 are relieved of the duty to report as set forth in the relevant rules of Canon 2 of the *Code of Judicial Conduct*. However, judges acting either as a committee member or volunteer may be subject to reinstatement of the duty to report as set forth in Rules 2.14 and 2.15 of the *Code of Judicial Conduct* and Comment [3A] to Rule 2.15.

JLAP Committee members, employees, and volunteers recruited pursuant to Rule 4, are absolutely immune to suit or action for their activities in discharge of their duties hereunder to the full extent of judicial immunity in Arkansas. (Adopted January 1, 2001; amended December 1, 2005; amended April 1, 2010.)

Rule 11. Facility.

The JLAP office shall be so located as to be consistent with the privacy and confidentiality requirements of this rule. (Adopted January 1, 2001.)

Rule 12. Program Review.

JLAP shall be reviewed annually by the Arkansas Supreme Court and shall cease to exist on December 31, 2006 unless the Arkansas Supreme Court provides otherwise. (Adopted January 1, 2001.)

Publisher's Notes. The Per Curiam Order dated November 30, 2006, provided: "In November of 1999, the Arkansas Bar Association and the Pulaski County Bar Association filed a petition with this court asking that we adopt the 'Arkansas Lawyers Assistance Program.' In that petition, the petitioners stated, 'The Arkansas Bar Association and the Pulaski County Bar Association believe a need exists to assist lawyers, law students, and Judges who are impaired by substance abuse, depression, and similar problems so that they may be persuaded to obtain treatment to assist them to overcome their problems, recover, and return to being responsible, productive members of the legal profession and of society. Further, a need exists to protect clients and the public from harm caused by impaired lawyers and Judges.'"

On July 7, 2000, we proposed the creation of a program for lawyers and judges and published for comment proposed rules for its operation. On December 7, 2000, by *per curiam* order, we created the Arkansas Lawyers Assistance Program (ArLAP) and adopted rules governing its operation. We concluded that the assertions of the petitioners pertaining to the need for such a program were likely well founded. However, we chose to include a 'sunset' provision which would cause ArLAP to cease to exist on December 31, 2006, absent further orders from this court.

Since the adoption of that *per curiam* order, this court has had the benefit of annual consultations with the professional staff employed to administer the program. During those meetings, we have been kept apprised of the development of the program as well as the evidence of the need for such a program.

ArLAP has been utilized by at least 165 members of the bench and bar to cope with one or more of the difficulties outlined in the original petition. The number of participants continues to increase each year. Further, the participants have come from all sections of the state, closely reflecting the distribution of population within the state.

Rule VII of the ArLAP rules provides that the Committee on Professional Conduct or the Judicial Discipline and Disability Commission may refer individuals to ArLAP as part of the disciplinary process. Since the inception of the program, a number of attorneys and judges have been referred to ArLAP. Providing such an option broadens the available resources for dealing with disciplinary issues arising from alcoholism, substance abuse, or other infirmities.

In order to provide funding, by *per curiam* order of September 16, 2004, we directed that \$20.00 of each annual license fee would be allocated to this program. We have learned that such a level of funding has proven to be adequate under current circumstances. The court is also informed that the ArLAP committee has recently established a non-profit foundation by which they seek contributions to further assist in the funding of ArLAP.

We conclude that the number of lawyers, judges, family members, and clients who have been positively affected by the existence of ArLAP is compelling evidence of the need for the program. We direct that the Arkansas Lawyers Assistance Program continue to exist in accordance with the rules and regulations originally adopted on December 7, 2000, as later amended, pending further orders of this court."

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Rule 1. Scope of rules.

The following rules are for the regulation of the Client Security Fund and shall apply to all claims filed commencing with the publication date of this order. At that time these rules will replace the per curiam order creating the Client Security Fund, 254 Ark. 1075, 493 S.W.2d 422 (1973), and the later amending per curiam orders, 310 Ark. 812, 832 S.W.2d 815 (1992); 306 Ark. 656 (1991); 300 Ark. 643, 782 S.W.2d 357 (1978); 291 Ark. 647, 722 S.W.2d LVIII (1987). (Adopted July 12, 1993.)

Publisher's Notes. Another Per Curiam of the Arkansas Supreme Court dated July 12, 1993, provided: "In 1973 this court, by per curiam order, created the Client Security Fund. *See In The Matter of Client Security Fund*, 254 Ark. 1075, 493 S.W.2d 422 (1973). The purpose of this trust fund is to protect clients from losses caused by the dishonest conduct of members of the Bar of Arkansas. Over the past twenty years, a number of changes have been made in the operation of the fund. *See per curiam orders In The Matter Of The Client Security Fund*, 310 Ark. 812, 832 S.W.2d 815 (1992); 306 Ark. 656 (1991); 300 Ark. 643, 782 S.W.2d 357 (1989); & 291 Ark. 647, 722 S.W.2d LVIII (1987). We have received a number of suggestions for changes in the operation of the Fund, and some of those suggestions have merit. The various suggestions have been made by the Arkansas Bar Association, individual members of the Bar of Arkansas, and judges.

"The Arkansas Bar Association and some individual members of the Bar of Arkansas have suggested that the Fund is under-utilized because of lack of public information about the Fund. We have requested that the Administrative Office of the Courts prepare a press release for the news media that would give information about the Fund. In addition, we have requested that the Administrative Office of the Courts prepare a draft of a pamphlet for future placement in court-houses.

"Claims made on the Fund must be filed with the Clerk of the Supreme Court. The

Clerk maintains a supply of claim forms and will mail a form to anyone who so requests. The Clerk's name and address are:

Mr. Leslie Steen
Clerk of the Supreme Court
Supreme Court of Arkansas
625 Marshall Street
Little Rock, Arkansas 72201

"Various members of the Bar have stated that it is difficult to find information about the Fund. The citations to the various per curiam opinions creating and modifying the operations of the Fund are set out above. In addition, this per curiam order and the prior per curiam orders concerning the Client Security Fund are being merged into one order so that the current Rules for the Client Security Fund will appear in the next edition of the *Court Rules* volume of the Arkansas Code of 1987 Annotated.

"It has been suggested that we raise the maximum amount that the Fund is authorized to pay to each client. Through the years we have raised the maximum amount from the initial \$5,000 in 1973 to the current maximum amount of \$25,000. Today, we raise the maximum amount to \$40,000. However, we retain the language from our original per curiam that reimbursements to a client are a matter of grace, not a matter of right, that no client or member of the public has any right in the Client Security Fund as a third party beneficiary or otherwise, and that the Client Security Fund Committee is empowered to admit or reject claims in whole or in part to the extent that funds are available to it.

"The Arkansas Bar Association has asked us to change the criteria for the payment of claims by the Client Security Fund Committee. The suggestion has merit, and today we slightly modify the criteria for eligible claims. At present the Committee is authorized to pay claims only for "reimbursement of losses from defalcations" by a member of the Bar. Commencing with the publication date of this order, the criteria for the Committee's payment of claims will be as follows:

A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a lawyer-client relationship or a fiduciary relationship between the lawyer and the claimant.

B. The claim shall have been filed no later than three years after the claimant knew or should have known of the dishonest conduct of the lawyer.

C. As used herein, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value. A dispute over the reasonableness of a lawyer's fee is not an eligible claim.

D. Except as provided by Section F herein, the following losses shall not be reimbursable:

(1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates, and employees of lawyer(s) causing the losses;

(2) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety, or insurer is subrogated, to the extent of that subrogated interest;

(3) Losses incurred by any financial institution which are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;

(4) Losses incurred by any business entity controlled by the lawyer, any person or entity described in Section D(1), (2), or (3) hereof;

(5) Losses incurred by any governmental entity or agency.

E. In cases of extreme hardship or spe-

cial and unusual circumstances, the Client Security Fund Committee may, in its discretion, recognize a claim which would otherwise be excluded under this Order.

F. In cases where it appears that there will be unjust enrichment, or the claimant unreasonably or knowingly contributed to the loss, the Client Security Fund Committee may, in its discretion, deny the claim.

"It has been suggested that we establish even broader criteria for the payment of claims. We decline to do so. The Fund is not designed to cover negligence or similar acts. Its purpose is to reimburse clients, to the extent money is available and up to the maximum allowable amount, for the dishonest conduct of a lawyer. It is not insurance.

"Various suggestions have been made for quicker payment of claims. Some of the suggestions are not practical because of their cost. Some, however, can be implemented, and we have modified the operation of the Client Security Fund Committee and the Committee on Professional Conduct to provide more prompt action. The Client Security Fund Committee may now reject claims without their first being fully processed by the Committee on Professional Conduct. In this way, if a client files a claim reimbursement for malpractice, for example, the committee can immediately reject the claim and so notify the client. If the client desires, he or she can still proceed to have the lawyer disciplined by the Committee on Professional Conduct. We retain the requirement that no claim can be paid until the lawyer shall have been disbarred, or suspended, from the practice of the law; has voluntarily, but permanently, surrendered his license to practice law; or has died before disbarment or suspension could take place. We provide that the Client Security Fund Committee can not vote by mail and facsimile transmission. This change is made because it is often difficult for five busy lawyers to find a convenient time to meet. In addition, more staff personnel have been added to the Committee on Professional Conduct, and that fact should have a beneficial indirect effect on the time required to pay a claim. These changes should benefit both the clients as well as the members of the Bar of Arkansas."

Rule 2. Committee.

In 1973 the Court appointed a committee of five lawyers, one from each Congressional District, and one from the State at large, to serve at the pleasure of the Court. The member first appointed from the First Congressional District served a term of one year from the date of his appointment, the first member from the Second District, two years, the first member from the Third District, three years, the first member from the Fourth District, four years, and the first member from the State at large, five years. The

successors of the members first appointed have been, and shall continue to be, appointed for terms of five years each. The Committee shall annually select one of its members as Chairperson, and another as Secretary, and shall adopt rules governing its procedures, which shall be subject to approval by this Court. A majority of committee members shall constitute a quorum. (Adopted July 12, 1993.)

Publisher's Notes. By Per Curiam Order dated July 12, 1993, this Court promulgated Rules Of The Client Security Fund Committee replacing all prior rules creating and regulating The Client Security Fund. Among other things, The Client Security Fund Committee was granted the authority to adopt rules governing its procedures, subject to the approval of the Court. Consonant with that authority The Client Security Fund Committee has adopted certain rules governing its procedures and submitted same for approval by this Court.

Upon consideration, the Court approves the procedural rules adopted by The Client Security Fund Committee, entitled "Rules Governing Procedures Of The Client Security Fund Committee," a copy of which is appended to this Order and made a part hereof by reference, to become effective on the publication date of this Order.

Pursuant to the authority granted The Client Security Fund Committee by the Arkansas Supreme Court in its Per Curiam of July 12, 1993, and any successor rules of the Court not inconsistent with the grant of authority to adopt rules governing procedures and to implement regulations in aid of the Court's

rules, The Client Security Fund Committee adopts and publishes the following procedural rules:

PROCEDURAL RULE 1. COMMITTEE MEETINGS The regular meetings of The Client Security Fund Committee shall be held in the months of October, February and June of each year. Dates for meetings to be held in the following twelve months shall be set at the June meeting of each year. Any regular meeting may be cancelled by the Committee Chair when it appears that the amount of business to be conducted does not reasonably justify such meeting. The Committee Chair may call an emergency meeting at any time such action is warranted.

PROCEDURAL RULE 2. FUNDS AVAILABLE FOR PAYMENT OF CLAIMS Consonant with the Court's adoption of a fiscal year of July 1 to June 30 for budgeting purposes for the Client Security Fund, the Committee adopts a like period for determination of funds available for payment of approved claims. Any and all claims approved by the Committee during said fiscal year shall be paid on a pro rata basis from the total funds available at the June meeting of each year.

CASE NOTES

In General.

The source of power to establish both the Committee on Professional Conduct and the Client Security Fund Committee is U.S. Const. Amend. 28, which provides: "The Su-

preme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law." *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994).

Rule 3. Name of committee — Authority to issue summonses and subpoenas — Disobedience thereof contempt of court.

The name of the Committee shall be "The Client Security Fund Committee." The Committee shall provide for its use a seal of such design as it may deem appropriate, and in the performance of duties imposed by rules of this Court and by its own regulations in aid of the Court's rules, shall have authority to issue summonses for any person or subpoena for any witness, directed to any sheriff or state police officer within the State, requiring the presence of any party or the attendance of any witness before it. Such process shall be issued under the seal of the Committee and signed by the Chairperson or Secretary thereof. Disobedience of any summons or subpoena or refusal to testify shall be regarded as constructive contempt of the Supreme Court. (Adopted July 12, 1993.)

Rule 4. Eligible claims — Maximum allowable amount.

Commencing with the publication date of this order, the criteria for the Committee's payment of claims will be as follows:

A. The loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of and by reason of a lawyer-client relationship or a fiduciary relationship between the lawyer and the claimant.

B. The claim shall have been filed no later than three years after the claimant knew or should have known of the dishonest conduct of the lawyer.

C. As used herein, "dishonest conduct" means wrongful acts committed by a lawyer in the nature of theft or embezzlement of money or the wrongful taking or conversion of money, property, or other things of value. A dispute over the reasonableness of a lawyer's fee is not an eligible claim.

D. Except as provided by Section F herein, the following losses shall not be reimbursable:

(1) Losses incurred by spouses, children, parents, grandparents, siblings, partners, associates, and employees of lawyer(s) causing the losses;

(2) Losses covered by any bond, surety agreement, or insurance contract to the extent covered thereby, including any loss to which any bonding agent, surety, or insurer is subrogated, to the extent of that subrogated interest;

(3) Losses incurred by any financial institution which are recoverable under a "banker's blanket bond" or similar commonly available insurance or surety contract;

(4) Losses incurred by any business entity controlled by the lawyer, any person or entity described in Section D(1), (2), or (3) hereof;

(5) Losses incurred by any governmental entity or agency.

E: In cases of extreme hardship or special and unusual circumstances, the Client Security Fund Committee may, in its discretion, recognize a claim which would otherwise be excluded under this Order.

F. In cases where it appears that there will be unjust enrichment, or the claimant unreasonably or knowingly contributed to the loss, the Client Security Fund Committee may, in its discretion, deny the claim.

Provided, however, that no claim shall be paid by the Committee until the Committee on Professional Conduct has certified that the member of the Bar of Arkansas has been disbarred or suspended from the practice of law, or has voluntarily resigned from the practice of law and surrendered his or her license to practice, or died before a disbarment, suspension, or surrender of license could take place. At that time the Executive Director of the Committee on Professional Conduct shall prepare for the Committee a summary of the evidence indicating the amount of the loss due to the dishonesty of the lawyer.

The Committee is authorized and empowered to admit or reject such claims in whole or in part to the extent that funds are available to it, and the Committee shall have complete discretion in determining the order and manner of payment of claims. No claim shall be allowed for an amount in excess of \$40,000. All reimbursements shall be a matter of grace and not of right, and no client or member of the public shall have any right in the Client Security Fund as third party beneficiary or otherwise. No attorney shall be compensated for prosecuting a claim against the Fund. (Adopted July 12, 1993.)

CASE NOTES

ANALYSIS

Construction.
Applicability.
Appeal.

Construction.

The “matter of grace” language in the last paragraph must be read in conjunction with the sentence stating that the fund is not insurance; the money to reimburse clients comes from the annual assessment of \$4.00 on each member of the Bar of Arkansas, and if those funds should not be sufficient to pay all claims in any one year, the Client Security Fund Committee might pay some claims in one year and the others in the next year, or might pay only a percentage of each valid claim. *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994).

Applicability.

In the per curiam creating the fund, the Supreme Court provided for payment only in cases in which the attorney had been disbarred or suspended from the practice of law or had voluntarily surrendered his attorney’s license; however, in 1987, the Supreme Court amended the original per curiam to provide for reimbursement to a client when the attorney died before disbarment, suspension, or surrender of license could be had. *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994).

Under the last paragraph, reimbursement is a matter of grace and not a matter of right;

nonetheless, a client should be reimbursed when he or she comes within the provisions of the rules for reimbursement and the Client Security Fund Committee has sufficient funds to make the payment. *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994).

Appeal.

Section 5 of the Procedures Regulating Professional Conduct of Attorneys at Law provides a right of appeal for an attorney who has been disbarred or suspended, but the Procedures do not expressly provide a right of appeal for a client filing a claim against the Client Security Fund; likewise, the rules governing the Client Security Fund Committee do not provide a right of appeal for a claimant seeking reimbursement from the fund. Even so, a right of appeal does exist. *Nosal v. Neal*, 318 Ark. 727, 888 S.W.2d 634 (1994).

Collection agent’s contentions that the Client Security Fund Committee abused its discretion in denying its claim for funds stolen by recipient’s attorney because the attorney had, in effect, been appointed trustee over the money at issue and he held the money in trust for the payment of his client’s medical bills, despite the fact that the probate court never used the words “trust” or “trustee,” were not addressed as the agent raised these claims for the first time on appeal, and not before the lower court. *Healthcare Recoveries, Inc. v. Ark. Client Sec. Fund*, 363 Ark. 102, 211 S.W.3d 512 (2005).

Rule 5. Place of filing claim.

Claims shall be filed with the Clerk of the Supreme Court, and he shall promptly forward the claim to the Committee’s representative. The Clerk’s address is:

Clerk of the Supreme Court
Supreme Court of Arkansas
625 Marshall Street
Little Rock, Arkansas 72201
(Adopted July 12, 1993.)

Rule 6. Provision for expenses of committee.

From the Fund created, members of the Committee shall be entitled to receive their actual, necessary travel and hotel expenses and reimbursement for postage, stationery, communication, and other incidental expenses, including stenographic bills and court costs chargeable against them. Upon instructions from the Supreme Court, the Committee may reimburse the Committee on Professional Conduct for actual expenses it might incur in performing services for the Committee. All such items shall be paid by the Clerk of this Court by check on said Fund, signed by the Clerk and countersigned by the Chairperson and Secretary of the Committee as true and correct. (Adopted July 12, 1993.)

Rule 7. Manner of payment.

The Committee may authorize payment from the Client Security Fund as provided herein. If the Committee finds, by a majority vote, that the claimant is entitled to payment from the Fund, it may determine the amount of any payment to be made to the claimant from the Fund. If it is not convenient for the members of the Committee to meet in person in a reasonable amount of time, the Chairperson of the Committee may submit by mail or facsimile transmission all of the necessary information to the Committee members, and they may vote by mail or facsimile transmission. A report, approving payment of any claims, shall be signed by a majority of the Committee members, and filed with the Clerk of this Court. Upon receipt of the aforesaid report, the Clerk will issue a check signed by the Clerk and countersigned by the Chief Justice for payment to the claimant from the Client Security Fund. (Adopted July 12, 1993.)

Rule 8. Reports.

The Committee shall provide a full report of its activities at least yearly to this Court, and it shall make such other reports of its activities and give such publicity to same as the Court may deem advisable. (Adopted July 12, 1993.)

Rule 9. Subrogation.

Payment shall be made from the Fund only upon condition that the Fund receive a pro-tanto assignment from the claimant for such payment of the claimant's rights against the lawyer involved, his personal representatives, and his estate and assigns, on condition that the Fund shall be entitled to reimbursement on such terms as the Committee may deem proper under the circumstances. Any sums collected by reason of such subrogation shall be for the sole benefit of the Fund and applied thereto. (Adopted July 12, 1993.)

Rule 10. Funding.

The Client Security Fund shall be financed by a portion of the annual license fees paid by the members of the Bar of Arkansas. Ten dollars of the annual license fee paid by each attorney to the Clerk of this Court shall be credited to the Client Security Fund, until further Order of this Court. The Committee shall have available to it the services of the employed personnel of the Supreme Court Committee on Professional Conduct. (Adopted July 12, 1993; amended June 19, 1995.)

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RULES OF COURT CREATING A COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Rule

I. Composition of committee on unauthorized practice of law.

II. Name — Seal — Powers.

III. Inquiries and complaints.

IV. Adoption of rules.

Rule

V. Expenses.

VI. Meetings open to public — Legal action.

APPENDIX

Rule I. Composition of committee on unauthorized practice of law.

The Court shall appoint a committee composed of four lawyers and three persons who are not lawyers. One lawyer member of the committee shall be from each Congressional district and the balance of the members shall be from the state-at-large. Members shall be appointed to serve a three year term and may be reappointed to a second three year term. A member whose term has expired, shall continue to serve until a replacement is appointed. The committee shall select one of its members as Chair, one as Vice-Chair, and another as secretary.

A majority of the committee shall constitute a quorum. (Amended November 8, 1993; amended July 11, 1994.)

Rule II. Name — Seal — Powers.

The name of the Committee shall be "The Supreme Court Committee on the Unauthorized Practice of Law." The Committee shall provide for its use a seal of such design as it may deem appropriate, and in the performance of its duties imposed by Rule of Court and by its own rules promulgated pursuant to Rule of Court, shall have authority to issue subpoena for any witness, including the production of documents, books, records, or other evidence, directed to any Sheriff or State Police officer within the state, requiring the presence of any person before it. Such process shall be issued under the seal of the committee and be signed by the Chair or Secretary. Disobedience of any subpoena or a refusal to testify may be regarded as constructive contempt of the Arkansas Supreme Court, and punishable by proceedings in that court. (Amended November 8, 1993; amended July 11, 1994.)

Rule III. Inquiries and complaints.

All inquiries and Complaints relating to the unauthorized practice of law shall be directed to the Committee, in writing, through the Administrative Office of the Courts. Upon receipt of such inquiry or Complaint the Committee may:

a. Without formal investigation make a determination that the action or course of conduct does not constitute unauthorized practice of law, or

b. Determine that probable cause exists for the conduct of a formal investigation and to conduct such investigation as is indicated, including the calling of witnesses for testimony under oath. Thereafter, the Committee shall:

1. Make a determination of whether in the opinion of the Committee, the action or course of conduct under investigation constitutes unauthorized practice of law.

2. Publish an advisory opinion directed to the interested parties and reflecting the decision of the Committee.

c. In the event of a finding of unauthorized practice of law and a continuation of the action or course of conduct after receipt of the Committee's advisory opinion, the Committee may bring an action or actions in the proper Court(s) seeking to enjoin that conduct deemed to constitute unauthorized practice of law, and to pursue such action(s) in the name of the committee to a final conclusion. (Amended November 8, 1993; amended July 11, 1994.)

Rule IV. Adoption of rules.

The Committee shall adopt rules of procedure for the handling of inquiries and complaints, and a copy of said rules of procedure shall be filed with the Clerk of the Arkansas Supreme Court, upon approval by the Court, and shall be subject to inspection and made available upon request of any interested person. (Amended May 4, 1992; amended November 8, 1993; amended July 11, 1994.)

Publisher's Notes. The Rules of Procedure appear in the Appendix following these rules.

Rule V. Expenses.

The members of the Committee may be entitled to receive per diem and reasonable reimbursement for the expenses of participating in the work of the Committee, including the cost of meals, lodging and transportation. The rate of reimbursement and per diem and all such expenditures shall be set and approved by the Director of the Administrative Office of the Courts. (Amended November 8, 1993; amended July 11, 1994.)

Rule VI. Meetings open to public — Legal action.

All inquiries and Complaints which proceed to hearing(s) before this Committee shall be open to the public and the news media. No advisory opinion issued by this Committee shall be construed as an Order of the Court. However, nothing in this section shall be deemed to restrict or in any manner inhibit the Committee from commencing such legal action as an arm of state government as it deems proper, to enjoin or restrain an activity or course of conduct deemed by a majority of a quorum of the Committee to be unauthorized practice of law within the statutes and laws of this state. (Amended November 8, 1993; amended July 11, 1994.)

APPENDIX

THE SUPREME COURT COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW RULES OF PROCEDURE

Publisher's Notes. The Per Curiam Order of July 11, 1994, provided, in part: "Having considered the Committee's request in light of its function and purpose, the Court adopts

and republishes the Rules Creating a Committee on the Unauthorized Practice of Law and Rules of Procedure in their entirety as amended.

Rule 1.

All matters directed to the attention of the Committee shall be in writing and signed.

Rule 2.

All matters directed to the attention of the Committee shall be submitted to the Administrative Office of the Courts. The Administrative Office of the Courts will retain the original and promptly mail a copy to each member of the Committee.

Rule 3.

Each inquiry and/or complaint shall be considered at a meeting attended by a quorum of the members. No decision can be reached on an inquiry or complaint by less than a majority of the quorum.

Rule 4.

(a) The Committee shall meet as needed and shall be subject to the call of the Chair upon seven (7) days notice. The Chair shall issue a call upon receipt of six (6) inquiries or complaints subsequent to the last meeting of the Committee.

(b) At the Chair's discretion, a meeting may be schedule by telephone conference call.

Rule 5.

Pursuant to Rule III a. of the Rules Creating a Committee on the Unauthorized Practice of Law, if, after discussion and consideration of an inquiry or complaint, the Committee determines that there is insufficient evidence on which to proceed with a formal investigation, the Committee shall issue a response to the complaining party to that effect.

Rule 6.

Pursuant to Rule III b. of the Rules Creating a Committee on the Unauthorized Practice of Law, if the Committee determines that a formal investigation is warranted, the Committee may use its discretion to proceed with the investigation as it deems appropriate, which may include the

calling of witnesses before one or more members of the Committee to give sworn testimony at an investigative hearing(s).

(a) Investigative hearings should be conducted as soon as practical after the Committee receives the inquiry or complaint.

(b) The investigative hearing shall be conducted in a manner prescribed by the Chair, who shall preside, or who shall designate a Committee member to preside.

(c) If, as a result of its formal investigation, the Committee determines that an act or acts of the unauthorized practice of law has occurred, the Committee shall issue an advisory opinion to that effect, directing that the party cease and desist said act or acts. Copies shall be mailed to the interested parties by certified mail.

Rule 7.

Pursuant to Rule III c. of the Rules Creating a Committee on the Unauthorized Practice of Law, the Committee, in its own name, may seek injunctive relief in the appropriate Court(s) if issuance of the advisory opinion does not result in cessation of those acts or course of conduct the Committee has pronounced to be the unauthorized practice of law.

Rule 8.

The Administrative Office of the Courts shall prepare and shall send by certified mail return receipt requested, all necessary correspondence at the direction of the Chair and shall send copies of said correspondence to each member of the Committee. The Administrative Office of the Courts shall maintain a file of all documents submitted or prepared in each case.

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THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT OF THE
COMMISSION ON THE
STRUCTURE OF THE
ATOMIC NUCLEUS
AND THE
PROPERTIES OF
THE ELEMENTS
OF THE PERIODIC
TABLE

BY
J. J. THOMSON
AND
P. A. M. DIRAC

CHICAGO, ILLINOIS
1932

ARKANSAS CODE OF JUDICIAL CONDUCT

PREAMBLE.
SCOPE.
TERMINOLOGY.
APPLICATION.

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A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

Rule

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Publisher's Notes. The revised Arkansas Code of Judicial Conduct was adopted by per curiam order on April 23, 2009 and became effective July 1, 2009.

PREAMBLE.

[1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.

[2] Judges should maintain the dignity of judicial office at all times, and avoid both impropriety and the appearance of impropriety in their professional and personal lives. They should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence.

[3] The Arkansas Code of Judicial Conduct establishes standards for the ethical conduct of judges and judicial candidates. It is not intended as an exhaustive guide for the conduct of judges and judicial candidates, who are governed in their judicial and personal conduct by general ethical standards as well as by the Code. The Code is intended, however, to provide guidance and assist judges in maintaining the highest standards of judicial and personal conduct, and to provide a basis for regulating their conduct through disciplinary agencies.

SCOPE.

[1] The Arkansas Code of Judicial Conduct consists of four Canons, numbered Rules under each Canon, and Comments that generally follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application section establishes when the various Rules apply to a judge or judicial candidate.

[2] The Canons state overarching principles of judicial ethics that all judges must observe. Although a judge may be disciplined only for violating a Rule, the Canons provide important guidance in interpreting the Rules. Where a Rule contains a permissive term, such as "may" or "should," the conduct being addressed is committed to the personal and professional discretion of the judge or candidate in question, and no disciplinary action should be taken for action or inaction within the bounds of such discretion.

[3] The Comments that accompany the Rules serve two functions. First, they provide guidance regarding the purpose, meaning, and proper application of the Rules. They contain explanatory material and, in some instances, provide examples of permitted or prohibited conduct. Comments neither add to nor subtract from the binding obligations set forth in the Rules. Therefore, when a Comment contains the term "must," it does not mean that the Comment itself is binding or enforceable; it signifies that the Rule in question, properly understood, is obligatory as to the conduct at issue.

[4] Second, the Comments identify aspirational goals for judges. To implement fully the principles of this Code as articulated in the Canons, judges should strive to exceed the standards of conduct established by the Rules, holding themselves to the highest ethical standards and seeking to achieve those aspirational goals, thereby enhancing the dignity of the judicial office.

[5] The Rules of the Arkansas Code of Judicial Conduct are rules of reason that should be applied consistent with constitutional requirements, statutes, other court rules, and decisional law, and with due regard for all relevant circumstances. The Rules should not be interpreted to impinge upon the essential independence of judges in making judicial decisions.

[6] Although the black letter of the Rules is binding and enforceable, it is not contemplated that every transgression will result in the imposition of discipline. Whether discipline should be imposed should be determined through a reasonable and reasoned application of the Rules, and should depend upon factors such as the seriousness of the transgression, the facts and circumstances that existed at the time of the transgression, the extent of any pattern of improper activity, whether there have been previous violations, and the effect of the improper activity upon the judicial system or others.

[7] The Code is not designed or intended as a basis for civil or criminal liability. Neither is it intended to be the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.

TERMINOLOGY.

“Aggregate,” in relation to contributions for a candidate, means not only contributions in cash or in kind made directly to a candidate’s campaign committee, but also all contributions made indirectly with the understanding that they will be used to support the election of a candidate or to oppose the election of the candidate’s opponent. See Rules 2.11 and 4.4.

“Appropriate authority” means the authority having responsibility for initiation of disciplinary process in connection with the violation to be reported. See Rules 2.14 and 2.15.

“Contribution” means both financial and in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which, if obtained by the recipient otherwise, would require a financial expenditure. See Rules 2.11, 2.13, 3.7, 4.1, and 4.4.

“De minimis,” in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality. See Rule 2.11.

“Domestic partner” means a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married. See Rules 2.11, 2.13, 3.13, and 3.14.

“Economic interest” means ownership of more than a de minimis legal or equitable interest. Except for situations in which the judge participates in the management of such a legal or equitable interest, or the interest could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, an officer, an advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge. See Rules 1.3 and 2.11.

"Fiduciary" includes relationships such as executor, administrator, trustee, or guardian. See Rules 2.11, 3.2, and 3.8.

"Impartial," "impartiality," and "impartially" mean absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge. See Canons 1, 2, and 4, and Rules 1.2, 2.2, 2.10, 2.11, 2.13, 3.1, 3.12, 3.13, 4.1, and 4.2.

"Impending matter" is a matter that is imminent or expected to occur in the near future. See Rules 2.9, 2.10, 3.13, and 4.1.

"Impropriety" includes conduct that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's independence, integrity, or impartiality. See Canon 1 and Rule 1.2.

"Independence" means a judge's freedom from influence or controls other than those established by law. See Canons 1 and 4, and Rules 1.2, 3.1, 3.12, 3.13, and 4.2.

"Integrity" means probity, fairness, honesty, uprightness, and soundness of character. See Canon 1 and Rule 1.2.

"Judicial candidate" means any person, including a sitting judge, who is seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or, where permitted, engages in solicitation or acceptance of contributions or support, or is nominated for election or appointment to office. See Rules 2.11, 4.1, 4.2, and 4.4.

"Knowingly," "knowledge," "known," and "knows" mean actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Rules 2.11, 2.13, 2.15, 2.16, 3.6, and 4.1.

"Law" encompasses court rules as well as statutes, constitutional provisions, and decisional law. See Rules 1.1, 2.1, 2.2, 2.6, 2.7, 2.9, 3.1, 3.4, 3.9, 3.12, 3.13, 3.14, 3.15, 4.1, 4.2, 4.4, and 4.5.

"Member of the candidate's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship.

"Member of the judge's family" means a spouse, domestic partner, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. See Rules 3.7, 3.8, 3.10, and 3.11.

"Member of a judge's family residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household. See Rules 2.11 and 3.13.

“Nonpublic information” means information that is not available to the public. Nonpublic information may include, but is not limited to, information that is sealed by statute or court order or impounded or communicated in camera, and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports. See Rule 3.5.

“Pending matter” is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition. See Rules 2.9, 2.10, 3.13, and 4.1.

“Personally solicit” means a direct request made by a judge or a judicial candidate for financial support or inkind services, whether made by letter, telephone, or any other means of communication. See Rule 4.1.

“Political organization” means a political party or other group sponsored by or affiliated with a political party or candidate, the principal purpose of which is to further the election or appointment of candidates for political office. For purposes of this Code, the term does not include a judicial candidate’s campaign committee created as authorized by Rule 4.4. See Rules 4.1 and 4.2.

“Public election” includes primary and general elections. See Rules 4.2 and 4.4.

“Third degree of relationship” includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece. See Rule 2.11.

COMMENT

[1] Regarding the term “judicial candidate,” in Arkansas, there are no retention elections, and selection by appointment arises in lim-

ited situations, such as to fill a newly created judgeship or a vacancy.

APPLICATION.

The Application section establishes when the various Rules apply to a judge or judicial candidate.

I. APPLICABILITY OF THIS CODE

(A) The provisions of the Code apply to all full-time judges. Parts II through V of this section identify those provisions that apply to four distinct categories of part-time judges. The four categories of judicial service in other than a full-time capacity are necessarily defined in general terms because of the widely varying forms of judicial service. Canon 4 applies to judicial candidates.

(B) A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including an officer such as a, magistrate, special master, referee, or member of the administrative law judiciary.

COMMENT

[1] The Rules in this Code have been formulated to address the ethical obligations of any person who serves a judicial function, and are premised upon the supposition that a uniform system of ethical principles should apply to all those authorized to perform judicial functions.

[2] The determination of which category

and, accordingly, which specific Rules apply to an individual judicial officer, depends upon the facts of the particular judicial service.

[3] In recent years many jurisdictions have created what are often called “problem solving” courts, in which judges are authorized by court rules to act in nontraditional ways. For example, judges presiding in drug courts and

monitoring the progress of participants in those courts' programs may be authorized and even encouraged to communicate directly with social workers, probation officers, and

others outside the context of their usual judicial role as independent decision makers on issues of fact and law.

II. [Reserved]

III. CONTINUING PART-TIME JUDGE

A judge who serves repeatedly on a part-time basis by election or under a continuing appointment, including a retired judge subject to recall who is permitted to practice law ("continuing part-time judge"),

(A) is not required to comply:

(1) with Rules 2.10(A) and 2.10(B) (Judicial Statements on Pending and Impending Cases), except while serving as a judge; or

(2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities), 3.14 (Reimbursement of Expenses and Waivers of Fees or Charges), 3.15 (Reporting Requirements); and

(B) shall not practice law in the court on which the judge serves, shall not appear in any criminal matter in the county in which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

COMMENT

[1] When a person who has been a continuing part-time judge is no longer a continuing part-time judge, including a retired judge no longer subject to recall, that person may act as a lawyer in a proceeding in which he or she has served as a judge or in any other proceeding related thereto only with the informed consent of all parties, and pursuant to any applicable Arkansas Rules of Professional Conduct.

[2A] Paragraph (B) does not, as a general rule, prohibit a continuing part-time judge from practicing law. However the position of a judge in presiding over a criminal matter and then appearing as a criminal defense attorney in a court of general jurisdiction and opposing that same prosecutor creates an appearance of impropriety, even when the proceedings are separate. Accordingly, continuing part time judges are prohibited from appearing in any

criminal matter in the county where the judge serves, regardless of how the criminal matter arises.

[3A] Because the position of the judge is paramount to the judge's private law practice, the judge should be particularly sensitive to conflicts that may arise when the judge presides over matters involving particular attorneys and then, in his or her private law practice, appears in adversary proceedings in a court of general jurisdiction opposing the same attorneys who appear before the judge. Opposing counsel may be hampered in vigorous advocacy against an attorney who wears judicial robes and presides over cases involving that counsel. The primacy of judicial service and the obligation to avoid even the appearance of impropriety mandate caution in accepting civil cases in disputed matters.

IV. PERIODIC PART-TIME JUDGE

A periodic part-time judge who serves or expects to serve repeatedly on a part-time basis, but under a separate appointment for each limited period of service or for each matter,

(A) is not required to comply:

(1) with Rule 2.10 (Judicial Statements on Pending and Impending Cases), except while serving as a judge; or

(2) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic

Organizations and Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), 3.15 (Reporting Requirements), 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office); and

(B) shall not practice law in the court on which the judge serves or in any court subject to the appellate jurisdiction of the court on which the judge serves, and shall not act as a lawyer in a proceeding in which the judge has served as a judge or in any other proceeding related thereto.

V. PRO TEMPORE PART-TIME JUDGE

A pro tempore part-time judge who serves or expects to serve once or only sporadically on a part-time basis under a separate appointment for each period of service or for each case heard is not required to comply:

(A) except while serving as a judge, with Rules 1.2 (Promoting Confidence in the Judiciary), 2.4 (External Influences on Judicial Conduct), 2.10 (Judicial Statements on Pending and Impending Cases), or 3.2 (Appearances before Governmental Bodies and Consultation with Government Officials); or

(B) at any time with Rules 3.4 (Appointments to Governmental Positions), 3.6 (Affiliation with Discriminatory Organizations), 3.7 (Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities), 3.8 (Appointments to Fiduciary Positions), 3.9 (Service as Arbitrator or Mediator), 3.10 (Practice of Law), 3.11 (Financial, Business, or Remunerative Activities), 3.13 (Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value), 3.15 (Reporting Requirements), 4.1 (Political and Campaign Activities of Judges and Judicial Candidates in General), and 4.5 (Activities of Judges Who Become Candidates for Nonjudicial Office).

VI. TIME FOR COMPLIANCE

A person to whom this Code becomes applicable shall comply immediately with its provisions, except that those judges to whom Rules 3.8 (Appointments to Fiduciary Positions) and 3.11 (Financial, Business, or Remunerative Activities) apply shall comply with those Rules as soon as reasonably possible, but in no event later than one year after the Code becomes applicable to the judge.

COMMENT

[1] If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Rule 3.8, continue to serve as fiduciary, but only for that period of time necessary to avoid serious adverse consequences to the beneficiaries of the fiduciary relationship and in no event longer than one

year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Rule 3.11, continue in that activity for a reasonable period but in no event longer than one year.

CANON 1

A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments — Arkansas Code of Judicial Conduct, 46 Ark. L. Rev. 1047.

CASE NOTES

ANALYSIS

In general.

Definitions.

Disqualification of judge.

Disqualification properly denied.

In General.

As officers of the court, lawyers must vigorously pursue their clients' interests, but they must do so with respect for the court; on the other hand, when others lose their composure and depart from professional demeanor, a judge is expected to keep his or hers intact and to assure that the proceedings are conducted in the most dignified manner possible. *Skokos v. Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994).

Where circuit court judge was arrested for driving while intoxicated, failure to register a vehicle, and unlawful use of dealer tag, the Arkansas Supreme Court concurred with the recommendation of the Arkansas Judicial Discipline and Disability Commission that a temporary suspension with pay, pending the outcome of any disciplinary determination resulting from three criminal charges filed, was proper; the judge and others involved would likely have been called as witnesses in future proceedings and their credibility would have been an issue. *In re Davis*, 358 Ark. 351, 189 S.W.3d 444 (2004).

Definitions.

A special master is a judge subject to the Code of Judicial Conduct. *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998).

A judge violated this canon and Canon 2A by failing to honor a subrogation contract that he and a client executed, by issuing insuffi-

cient checks on his operating account for the purchase of goods, services, and the payment of debts, by failing to pay his 1994 federal personal income tax, and by operating a motor vehicle with a fictitious license plate tag. *Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

Disqualification of Judge.

Where the circuit court suspected judge shopping and heard testimony, it concluded that the citizen retained the attorney to force recusal; although the citizen concluded that he would be better served by a judge other than the circuit court judge, the desire for a different judge did not support disqualification of a judge. *Valley v. Phillips County Election Comm'n*, 357 Ark. 494, 183 S.W.3d 557 (2004).

Disqualification Properly Denied.

Court rejected a city's argument that the circuit court erred in failing to recuse a judge who had served as a city attorney for appellee and who had represented appellee in a similar action against appellant before taking the bench. The court found no allegation of actual bias nor any demonstration by the city of prejudice. *City of Rockport v. City of Malvern*, 2010 Ark. 449, — S.W.3d —, 2010 Ark. LEXIS 559 (Nov. 18, 2010).

Cited: *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997), dismissed, 335 Ark. 113, 983 S.W.2d 113 (1998); *Ark. Judicial Discipline & Disability Comm'n v. Simes*, 2011 Ark. 193, — S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).

Rule 1.1. Compliance with the Law.

A judge shall comply with the law, including the Arkansas Code of Judicial Conduct.

Rule 1.2. Promoting Confidence in the Judiciary.

A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.

COMMENT

[1] Public confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety. This principle applies to both the professional and personal conduct of a judge.

[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.

[3] Conduct that compromises or appears to compromise the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary. Because it is not practicable to list all such conduct, the Rule is necessarily cast in general terms.

[4] Judges should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within

the judiciary and the legal profession, and promote access to justice for all.

[5] Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

[6] A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice. In conducting such activities, the judge must act in a manner consistent with this Code.

Rule 1.3. Avoiding Abuse of the Prestige of Judicial Office.

A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.

COMMENT

[1] It is improper for a judge to use or attempt to use his or her position to gain personal advantage or deferential treatment of any kind. For example, it would be improper for a judge to allude to his or her judicial status to gain favorable treatment in encounters with traffic officials. Similarly, a judge must not use judicial letterhead to gain an advantage in conducting his or her personal business.

[2] A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

[3] Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office.

[4] Special considerations arise when judges write or contribute to publications of for-profit entities, whether related or unrelated to the law. A judge should not permit anyone associated with the publication of such materials to exploit the judge's office in a manner that violates this Rule or other applicable law. In contracts for publication of a judge's writing, the judge should retain sufficient control over the advertising to avoid such exploitation.

CANON 2

JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments — Arkansas Code of Judicial Conduct, 46 Ark. L. Rev. 1047.

CASE NOTES

ANALYSIS

In general.
Abuse of discretion.
Appellate review.
Attorney-judge relationship.
Bias not shown.
Bias shown.
Burden of proof.
Business relationship.
Class action.
Conduct during trial.
Discretion of court.
Disqualification.
Disqualification properly denied.
Family influences.
Formal opinions.
Former prosecutor.
Master.
Personal knowledge.
Recusal.
Sufficiency of evidence.

In General.

Where circuit court judge was arrested for driving while intoxicated, failure to register a vehicle, and unlawful use of dealer tag, the Arkansas Supreme Court concurred with the recommendation of the Arkansas Judicial Discipline and Disability Commission that a temporary suspension with pay, pending the outcome of any disciplinary determination resulting from three criminal charges filed, was proper; the judge and others involved would likely have been called as witnesses in future proceedings and their credibility would have been an issue. *In re Davis*, 358 Ark. 351, 189 S.W.3d 444 (2004).

Abuse of Discretion.

Even if the granting of a continuance may have been lenient, such did not rise to the level of bias or prejudice required for the court to reverse a decision on the merits and disqualify a trial judge for abuse of his discretion in declining to recuse. *Black v. Van Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998).

Appellate review.

The decision to recuse is within the trial court's discretion and will not be reversed

absent a showing of bias or prejudice on the part of the trial court. *Lofton v. State*, 57 Ark. App. 226, 944 S.W.2d 131 (1997).

Attorney-Judge Relationship.

A trial judge need not recuse simply because that judge has previously prosecuted the defendant for separate crimes which might be used for sentence enhancement purposes, particularly when considerable time has passed since the earlier prosecutions. *Turner v. State*, 325 Ark. 237, 926 S.W.2d 843 (1996).

Chancellor not required to recuse where attorney for one party had previously represented the chancellor in an unrelated matter. *Noland v. Noland*, 326 Ark. 617, 932 S.W.2d 341 (1996).

Bias Not Shown.

Recusal not required where the defendant did not allege any specific instances of bias or show that he was prejudiced and where a jury determined the defendant's guilt. *Keene v. State*, 56 Ark. App. 42, 938 S.W.2d 859 (1997).

Even if the granting of a continuance may have been lenient, such did not rise to the level of bias or prejudice required for the court to reverse a decision on the merits and disqualify a trial judge for abuse of his discretion in declining to recuse. *Black v. Van Steenwyk*, 333 Ark. 629, 970 S.W.2d 280 (1998).

Trial judge did not err in denying defendant's motions to recuse; defendant failed to show that recusal was required by the fact that the judge, a former prosecutor, had previously prosecuted defendant, nor was recusal required by the remand of defendant's initial conviction, the judge's decision to increase bond, or the judge's threat to have defendant's mouth taped closed to prevent disruption of a pretrial hearing. *Irvin v. State*, 345 Ark. 541, 49 S.W.3d 635 (2001).

Sister presented no convincing argument or authority that the trial judge was required to act further upon her request that he recuse himself; the mere fact that the judge knew their family and had been previously concerned about the mother during her stay in

intensive care were not sufficient to demonstrate bias. *Kimbrough v. Kimbrough*, 83 Ark. App. 179, 119 S.W.3d 66 (2003).

Prior to his capital murder trial, defendant filed a motion to seek recusal of the circuit judge; specifically, defendant argued that the circuit judge could have had an interest in the case as well as that there was an appearance of bias. Despite defendant's allegations, however, the circuit judge explained that he did not know the victims or any defendant, and the circuit court did not err in refusing to recuse himself. *Stephenson v. State*, 373 Ark. 134, 282 S.W.3d 772 (2008).

Denial of the mother's motion for recusal of the judge based upon her prior complaint against the trial court judge for the failure to render a prompt and expedient decision was proper because the trial judge stated that he had no animosity toward the mother, that he understood that her actions were not without reason, and that he believed that she was justified. The trial judge assured the mother that he would give her a fair and impartial hearing; therefore, the mother failed to show prejudice and failed to demonstrate bias in the record. *Mathews v. Schumacher*, 2010 Ark. App. 155, — S.W.3d —, 2010 Ark. App. LEXIS 164 (2010).

Bias Shown.

A judge violated this Canon and Canon 2 where the judge, upon seeing that the petition involved a particular department store, tried to find another judge to review the petition because he and his wife held a significant amount of the department store's stock, but was unable to locate an immediately available judge, and where, because the matter requested a temporary restraining order, the judge proceeded to review the pleadings and granted the temporary restraining order. *Huffman v. State Judicial Discipline & Disability Comm'n*, 344 Ark. 274, 42 S.W.3d 386 (2001).

Burden of Proof.

Judges are presumed to be impartial and the party seeking disqualification bears a substantial burden in proving otherwise. *Gentry v. State*, 47 Ark. App. 117, 886 S.W.2d 885 (1994).

Defendant did not meet her burden of proving that the judge, a former law partner of the plaintiff, was biased and therefore should recuse. *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997), dismissed, 335 Ark. 113, 983 S.W.2d 113 (1998).

In construing subsection E of this canon, there is a presumption of impartiality, and the party seeking disqualification has the burden of proving otherwise. *Lofton v. State*, 57 Ark. App. 226, 944 S.W.2d 131 (1997).

Business Relationship.

Defendant did not meet her burden of proving that the judge, a former law partner of the plaintiff, was biased and therefore should recuse. *Dolphin v. Wilson*, 328 Ark. 1, 942 S.W.2d 815 (1997), dismissed, 335 Ark. 113, 983 S.W.2d 113 (1998).

A judge violated this Canon and Canon 3 where the judge, upon seeing that the petition involved a particular department store, tried to find another judge to review the petition because he and his wife held a significant amount of the department store's stock, but was unable to locate an immediately available judge, and, where, because the matter requested a temporary restraining order, the judge proceeded to review the pleadings and granted the temporary restraining order. *Huffman v. State Judicial Discipline & Disability Comm'n*, 344 Ark. 274, 42 S.W.3d 386 (2001).

Class Action.

Because the judge had no interest in the underlying action beyond that of the general interest which any other taxpayer or property owner had, he did not have a personal or pecuniary interest of the type that disqualified a judge. *Worth v. Benton County Circuit Court*, 351 Ark. 149, 89 S.W.3d 891 (2002).

Conduct During Trial.

Although the trial judge's conduct seemed inappropriately adversarial to defendant's counsel, the mere happenstance that the judge expressed an opinion on a matter under consideration did not automatically disqualify him from further participation. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993) (decision under prior law).

Discretion of Court.

The decision to disqualify from a case is discretionary with a judge and a judge's decision in this regard will not be reversed absent an abuse of that discretion. *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993) (decision under prior law); *Gentry v. State*, 47 Ark. App. 117, 886 S.W.2d 885 (1994).

Both Ark. Const., Art. 7, § 20, and this canon provide that judges must refrain from presiding over cases in which they might be interested and avoid all appearances of bias; on appeal, a judge's decision not to recuse is affirmed when there is no abuse of discretion. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994).

The decision by a judge whether or not to recuse lies within the judge's discretion, and certiorari does not lie to control a judge's discretion. *Skokos v. Gray*, 318 Ark. 571, 886 S.W.2d 618 (1994).

Disqualification.

Absent a statutory provision to the contrary, a determination of disqualification will

not prevent a judge from reassuming full jurisdiction if the disqualification has been removed. *Matthews v. State*, 313 Ark. 327, 854 S.W.2d 339 (1993) (decision under prior law).

The Canons suggest that a judge disqualify when his impartiality might reasonably be questioned. *Carton v. Missouri Pac. R.R.*, 315 Ark. 5, 865 S.W.2d 635 (1993) (decision under prior law).

Although judge had been a victim of some of the same crimes charged against defendant, he was not required to disqualify himself. *Reel v. State*, 318 Ark. 565, 886 S.W.2d 615 (1994).

Where judge's prior knowledge in a case came from previous judicial proceedings in the same case, the judge's alleged personal knowledge did not require him to recuse. *Gentry v. State*, 47 Ark. App. 117, 886 S.W.2d 885 (1994).

Because the judge had no interest in the underlying action beyond that of the general interest which any other taxpayer or property owner had, he did not have a personal or pecuniary interest of the type that disqualified a judge. *Worth v. Benton County Circuit Court*, 351 Ark. 149, 89 S.W.3d 891 (2002).

Where circuit court judge was arrested for driving while intoxicated, failure to register a vehicle, and unlawful use of dealer tag, the Arkansas Supreme Court concurred with the recommendation of the Arkansas Judicial Discipline and Disability Commission that a temporary suspension with pay, pending the outcome of any disciplinary determination resulting from three criminal charges filed, was proper; the judge and others involved would likely have been called as witnesses in future proceedings and their credibility would have been an issue. *In re Davis*, 358 Ark. 351, 189 S.W.3d 444 (2004).

Disqualification Properly Denied.

Court rejected a city's argument that the circuit court erred in failing to recuse a judge who had served as a city attorney for appellee and who had represented appellee in a similar action against appellant before taking the bench. The court found no allegation of actual bias nor any demonstration by the city of prejudice. *City of Rockport v. City of Malvern*, 2010 Ark. 449, — S.W.3d —, 2010 Ark. LEXIS 559 (Nov. 18, 2010).

Family Influences.

Argument that the trial judge should have recused himself because his son was employed in the prosecutor's office held without merit where the trial judge stated that his son was 20 years old, that he no longer lived in the judge's home, and that he was a part-time temporary employee as an errand boy in the hot checks division of the prosecutor's office; the relationship was so insignificant it was

simply not a factor. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994).

Allowing a trial judge's spouse to serve as a juror in a case where the trial judge presided created an appearance of impropriety; therefore, the trial judge should have excused his wife for cause. *Elmore v. State*, 355 Ark. 620, 144 S.W.3d 278 (2004).

Formal Opinions.

The fact that a justice wrote a dissenting opinion, which involved some of the same questions presented in a different appeal, is not a valid reason for recusal under this canon. *United States Term Limits, Inc. v. Hill*, 315 Ark. 685, 870 S.W.2d 383 (1994).

Former Prosecutor.

Argument that the trial judge should have recused because his son was employed in the prosecutor's office held without merit where the trial judge stated that his son was 20 years old, that he no longer lived in the judge's home, and that he was a part-time temporary employee as an errand boy in the hot checks division of the prosecutor's office; the relationship was so insignificant it was simply not a factor. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994).

Although the defendant argued that the trial judge should have recused from considering his Rule 37 petition because the trial judge, before he assumed the bench, prosecuted defendant on an unrelated matter ten years prior to the filing of the charges on which he is presently incarcerated, and that the trial judge gained additional knowledge about defendant when he represented him on a civil matter, and that the judge played a role in defendant return from the Act 309 program in Lawrence County, the trial court properly denied the motion to recuse. *Beshears v. State*, 329 Ark. 469, 947 S.W.2d 789 (1997).

Recusal was not warranted where the judge who served as prosecutor during the investigation of defendant was not the prosecutor at the time the defendant was arrested; the judge was not "of counsel" in the defendant's case. *Lofton v. State*, 57 Ark. App. 226, 944 S.W.2d 131 (1997).

Master.

Where a master conducted an independent investigation and obtained evidence in an ex parte communication manner, he violated the canon and would be relieved of responsibility for further conduct of his assignment. *Horton v. Ferrell*, 335 Ark. 366, 981 S.W.2d 88 (1998).

Personal Knowledge.

The personal knowledge of a judge, gleaned from previous judicial proceedings, does not fall under the "personal knowledge" category of former subdivision C(1)(a) of Canon 3 (now Rule 2.11(A)(1) of this Canon). *Sheridan v. State*, 313 Ark. 23, 852 S.W.2d 772 (1993).

Recusal.

The fact that a justice wrote a dissenting opinion, which involved some of the same questions presented in a different appeal, is not a valid reason for recusal under this canon. *United States Term Limits, Inc. v. Hill*, 315 Ark. 685, 870 S.W.2d 383 (1994).

A trial judge's development of opinions, biases, or prejudices during a trial do not make the trial judge so biased as to require recusal from further proceedings in the case; further, adverse rulings do not, in themselves, demonstrate bias. *Carmical v. McAfee*, 68 Ark. App. 313, 7 S.W.3d 350 (1999).

A trial judge is not required to recuse if his or her former law partner is counsel in the proceeding at hand. *Carmical v. McAfee*, 68 Ark. App. 313, 7 S.W.3d 350 (1999).

The trial court was not required to recuse itself in a murder prosecution on the basis of a communication between the court and the victim's wife in which the court asked the wife to cooperate with an order which allowed the defendant to view the crime scene, i.e., the victim's home. *Kail v. State*, 341 Ark. 89, 14 S.W.3d 878 (2000).

Where petitioner asserted that because of his proposed amendment limiting salaries and other benefits of public servants, including those of the justices, there was an appearance of bias on the part of the justices since they had a financial interest in the matter that required their recusal, even if the supreme court had original jurisdiction to initially consider a claim based on illegal exactions, the justices still would have been empowered and duty bound to consider and decide the issues petitioner strived to raise under the "Rule of Necessity," under former subdivision E(1) of Canon 3 (now Rule 2.11 of this Canon). *White v. Priest*, 348 Ark. 135, 73 S.W.3d 572 (2002), cert. denied, 537 U.S. 949, 123 S. Ct. 381, 154 L. Ed. 2d 295 (2002).

The fact the victim's sister was an employee of the trial judge's former law firm, and that defendant's counsel had ran against the judge in a past election, intended to run against the judge again, and had been jailed for contempt by the judge in the past, was not grounds for the judge's recusal. *Holder v. State*, 354 Ark. 364, 124 S.W.3d 439 (2003).

State's appeal of a trial judge's failure to recuse himself from a sentencing hearing was not appealable under Ark. R. App. P. Crim. 3(c) because this issue was based on the particular facts of the case; it was not a case requiring an interpretation of criminal rules with widespread ramification. After having ex parte communication with a juror between the jury's verdict and the sentencing hearing, the judge reduced the sentence entered by the jury and removed the fine in an assault case; the State contended that the judge should have recused himself. *Barritt v. State*, 372 Ark. 395, 277 S.W.3d 211 (2008).

Circuit judge was reprimanded for violating Ark. Code Jud. Conduct Canons 2(A) and 3(B)(2) where the judge conducted Ark. R. Civ. P. 11 proceedings before the court attempted to determine the falsity of the allegations in a motion for recusal, and the court ultimately failed to establish that the allegations were false. *Ark. Judicial Discipline & Disability Comm'n v. Simes*, 2011 Ark. 193, — S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).

Sufficiency of Evidence.

Evidence was sufficient to show that chancellor exhibited the appearance of bias. *City of Jacksonville v. Venhaus*, 302 Ark. 204, 788 S.W.2d 478 (1990) (decision under prior law).

A judge violated Canon 1 and this canon by failing to honor a subrogation contract that he and a client executed, by issuing insufficient checks on his operating account for the purchase of goods, services, and the payment of debts, by failing to pay his 1994 federal personal income tax, and by operating a motor vehicle with a fictitious license plate tag. *Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

Cited: *Duty v. State*, 45 Ark. App. 1, 871 S.W.2d 400 (1994); *Noland v. Noland*, 326 Ark. 617, 932 S.W.2d 341 (1996); *Sturgis v. Skokos*, 335 Ark. 41, 977 S.W.2d 217 (1998); *Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000); *Urquhart v. Davis*, 341 Ark. 653, 19 S.W.3d 21 (2000); *SEECO, Inc. v. Hales*, 341 Ark. 673, 22 S.W.3d 157 (2000); *Walls v. State*, 341 Ark. 787, 20 S.W.3d 322 (2000).

Rule 2.1. Giving Precedence to the Duties of Judicial Office.

The duties of judicial office, as prescribed by law, shall take precedence over all of a judge's personal and extrajudicial activities.

COMMENT

[1] To ensure that judges are available to fulfill their judicial duties, judges must conduct their personal and extrajudicial activi-

ties to minimize the risk of conflicts that would result in frequent disqualification. See Canon 3.

[2] Although it is not a duty of judicial office unless prescribed by law, judges are encouraged to participate in activities that promote

public understanding of and confidence in the justice system.

Rule 2.2. Impartiality and Fairness.

A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

COMMENT

[1] To ensure impartiality and fairness to all parties, a judge must be objective and open-minded.

[2] Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.

[3] When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule.

[4] It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

Rule 2.3. Bias, Prejudice, and Harassment.

(A) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(B) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.

(C) A judge shall require lawyers in proceedings before the court to refrain from manifesting bias or prejudice, or engaging in harassment, against parties, witnesses, lawyers, or others.

(D) The restrictions of paragraphs (B) and (C) do not preclude judges or lawyers from making legitimate reference to personal characteristics when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and law-

yers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment, as referred to in paragraphs (B) and (C), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on the basis of personal characteristics.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Rule 2.4. External Influences on Judicial Conduct.

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

COMMENT

[1] An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government offi-

cial, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences.

Rule 2.5. Competence, Diligence, and Cooperation.

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] A judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters

under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Rule 2.6. Ensuring the Right to Be Heard.

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

(B) A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.

COMMENT

[1] The right to be heard is an essential component of a fair and impartial system of justice. Substantive rights of litigants can be protected only if procedures protecting the right to be heard are observed.

[2] The judge plays an important role in overseeing the settlement of disputes, but should be careful that efforts to further settlement do not undermine any party's right to be heard according to law. The judge should keep in mind the effect that the judge's participation in settlement discussions may have, not only on the judge's own views of the case, but also on the perceptions of the lawyers and the parties if the case remains with the judge after settlement efforts are unsuccessful. Among the factors that a judge should

consider when deciding upon an appropriate settlement practice for a case are (1) whether the parties have requested or voluntarily consented to a certain level of participation by the judge in settlement discussions, (2) whether the parties and their counsel are relatively sophisticated in legal matters, (3) whether the case will be tried by the judge or a jury, (4) whether the parties participate with their counsel in settlement discussions, (5) whether any parties are unrepresented by counsel, and (6) whether the matter is civil or criminal.

[3] Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impar-

tiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in

such instances, the judge should consider whether disqualification may be appropriate. See Rule 2.11(A)(1).

Rule 2.7. Responsibility to Decide.

A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

COMMENT

[1] Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring pub-

lic disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Rule 2.8. Decorum, Demeanor, and Communication with Jurors.

(A) A judge shall require order and decorum in proceedings before the court.

(B) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials, and others subject to the judge's direction and control.

(C) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding.

COMMENT

[1] The duty to hear all proceedings with patience and courtesy is not inconsistent with the duty imposed in Rule 2.5 to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

[2] Commending or criticizing jurors for their verdict may imply a judicial expectation

in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

[3] A judge who is not otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial but should be careful not to discuss the merits of the case.

Rule 2.9. Ex Parte Communications.

(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

(2) A judge may obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received.

(3) A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.

(4) [Reserved]

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.

(B) If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.

(C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

(D) A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control.

COMMENT

[1] To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

[2] Whenever the presence of a party or notice to a party is required by this Rule, it is the party's lawyer, or if the party is unrepresented, the party, who is to be present or to whom notice is to be given.

[3] The proscription against communications concerning a proceeding includes communications with lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted by this Rule.

[4] A judge may initiate, permit, or consider ex parte communications expressly authorized by law, such as when serving on therapeutic or problem-solving courts, mental health courts, or drug courts. In this capacity,

judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others.

[5] A judge may consult with other judges on pending matters, but must avoid ex parte discussions of a case with judges who have previously been disqualified from hearing the matter, and with judges who have appellate jurisdiction over the matter.

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

[7] A judge may consult ethics advisory committees, outside counsel, or legal experts concerning the judge's compliance with this Code. Such consultations are not subject to the restrictions of paragraph (A)(2).

CASE NOTES

Letter Sent to Judge.

Appellant sent the judge a letter, and the court noted that subsection (b) of this Canon provided guidance regarding correspondence

such as this. *Smith v. State*, 2012 Ark. App. 130, — S.W.3d —, 2012 Ark. App. LEXIS 221 (Feb. 8, 2012).

Rule 2.10. Judicial Statements on Pending and Impending Cases.

(A) A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(C) A judge shall require court staff, court officials, and others subject to the judge's direction and control to refrain from making statements that the judge would be prohibited from making by paragraphs (A) and (B).

(D) Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

(E) Subject to the requirements of paragraph (A), a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter.

COMMENT

[1] This Rule's restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

[2] This Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an

official capacity, such as a writ of mandamus, the judge must not comment publicly.

[3] Depending upon the circumstances, the judge should consider whether it may be preferable for a third party, rather than the judge, to respond or issue statements in connection with allegations concerning the judge's conduct in a matter.

Rule 2.11. Disqualification.

(A) A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

(4) [Reserved]

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household.

(C) A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

COMMENT

[1] Under this Rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific provisions of paragraphs (A)(1) through (6) apply. In many jurisdictions, the term "recusal" is used interchangeably with the term "disqualification."

[2] A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.

[3] The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.

[4] The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge. If, however, the judge's impartiality might reasonably be questioned

under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

[4A] The fact that a lawyer in a proceeding, or a litigant, contributed to the judge's campaign, or publicly supported the judge in his or her election does not of itself disqualify the judge. However, the size of contributions, the degree of involvement in the campaign, the timing of the campaign and the proceeding, the issues involved in the proceeding, and other factors known to the judge may raise questions as to the judge's impartiality under paragraph (A).

[5] A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.

[6] "Economic interest," as set forth in the Terminology section, means ownership of more than a de minimis legal or equitable interest. Except for situations in which a judge participates in the management of such a legal or equitable interest, or the interest

could be substantially affected by the outcome of a proceeding before a judge, it does not include:

(1) an interest in the individual holdings within a mutual or common investment fund;

(2) an interest in securities held by an educational, religious, charitable, fraternal, or civic organization in which the judge or the judge's spouse, domestic partner, parent, or child serves as a director, officer, advisor, or other participant;

(3) a deposit in a financial institution or deposits or proprietary interests the judge may maintain as a member of a mutual savings association or credit union, or similar proprietary interests; or

(4) an interest in the issuer of government securities held by the judge.

Rule 2.12. Supervisory Duties.

(A) A judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges shall take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them.

COMMENT

[1] A judge is responsible for his or her own conduct and for the conduct of others, such as staff, when those persons are acting at the judge's direction or control. A judge may not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when such conduct would violate the Code if undertaken by the judge.

[2] Public confidence in the judicial system depends upon timely justice. To promote the efficient administration of justice, a judge with supervisory authority must take the steps needed to ensure that judges under his or her supervision administer their workloads promptly.

Rule 2.13. Administrative Appointments.

(A) In making administrative appointments, a judge:

(1) shall exercise the power of appointment impartially and on the basis of merit; and

(2) shall avoid nepotism, favoritism, and unnecessary appointments.

(B) [Reserved]

(C) A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(D) No judge shall employ a spouse or other relative unless it has been affirmatively demonstrated to the Arkansas Judicial Discipline and Disability Commission that it is impossible for the judge to hire any other qualified person to fill the position.

COMMENT

[1] Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, and guardians, and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by paragraph (A).

[2] Unless otherwise defined by law, nepotism is the appointment or hiring of any relative within the third degree of relationship of either the judge or the judge's spouse or domestic partner, or the spouse or domestic partner of such relative.

[3] [Reserved]

Rule 2.14. Disability and Impairment.

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

COMMENT

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many ap-

proaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

[3A] Judges may exercise discretion in referring a lawyer or another judge to the Arkansas Judges and Lawyers Assistance Program. See Rule 2.15.

Rule 2.15. Responding to Judicial and Lawyer Misconduct.

(A) A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects shall inform the appropriate authority.

(B) A judge having knowledge that a lawyer has committed a violation of the Arkansas Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code shall take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Arkansas Rules of Professional Conduct shall take appropriate action.

COMMENT

[1] Taking action to address known misconduct is a judge's obligation. Paragraphs (A) and (B) impose an obligation on the judge to report to the appropriate disciplinary authority the known misconduct of another judge or a lawyer that raises a substantial question regarding the honesty, trustworthiness, or fitness of that judge or lawyer. Ignoring or denying known misconduct among one's judicial colleagues or members of the legal profession undermines a judge's responsibility to participate in efforts to ensure public respect for the justice system. This Rule limits the reporting obligation to those offenses that an independent judiciary must vigorously endeavor to prevent.

[2] A judge who does not have actual knowl-

edge that another judge or a lawyer may have committed misconduct, but receives information indicating a substantial likelihood of such misconduct, is required to take appropriate action under paragraphs (C) and (D). Appropriate action may include, but is not limited to, communicating directly with the judge who may have violated this Code, communicating with a supervising judge, or reporting the suspected violation to the appropriate authority or other agency or body. Similarly, actions to be taken in response to information indicating that a lawyer has committed a violation of the Arkansas Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the viola-

tion, or reporting the suspected violation to the appropriate authority or other agency or body.

[3A] This rule shall not apply to a Judge who is a member of the Judges and Lawyers Assistance Committee (“the Committee”) of the Arkansas Judges and Lawyers Assistance Program (JLAP) or a volunteer serving pursuant to Rule 4 of the Rules of JLAP regarding information received in his or her capacity as a Committee member or volunteer. How-

ever, the “duty to report” outlined in Rule 2.15 above is reinstated if, in good faith, the JLAP committee member or volunteer has: reason to believe that an attorney or judge participating in the JLAP program is failing to cooperate with said program; is engaged in criminal behavior or the threat thereof; or, is otherwise in violation of Rule 2.15 which is beyond or succeeds the behavior upon which the judge’s participation in JLAP was initially based. (Amended April 1, 2010.)

Rule 2.16. Cooperation with Disciplinary Authorities.

(A) A judge shall cooperate and be candid and honest with judicial and lawyer disciplinary agencies.

(B) A judge shall not retaliate, directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.

COMMENT

[1] Cooperation with investigations and proceedings of judicial and lawyer discipline agencies, as required in paragraph (A), in-

stills confidence in judges’ commitment to the integrity of the judicial system and the protection of the public.

CANON 3

A JUDGE SHALL CONDUCT THE JUDGE’S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

Cross References. Assistance for lawyers with substance abuse problems, Arkansas

Lawyers’ Assistance Program Rules.

RESEARCH REFERENCES

Ark. L. Rev. Recent Developments — Arkansas Code of Judicial Conduct, 46 Ark. L. Rev. 1047.

CASE NOTES

ANALYSIS

Bias not shown.
Financial activities.
Proper sanction.
Recusal.

Bias Not Shown.

Denial of the mother’s motion for recusal of the judge based upon her prior complaint against the trial court judge for the failure to render a prompt and expedient decision was proper under subdivision (B)(8) of this canon because the trial judge stated that he had no animosity toward the mother, that he under-

stood that her actions were not without reason, and that he believed that she was justified. The trial judge assured the mother that he would give her a fair and impartial hearing; therefore, the mother failed to show prejudice and failed to demonstrate bias in the record. *Mathews v. Schumacher*, 2010 Ark. App. 155, — S.W.3d —, 2010 Ark. App. LEXIS 164 (2010).

Trial judge did not err in denying defendant’s motion to recuse on the ground that the judge knew his fiancée’s parents because there was nothing to indicate that the trial judge displayed prejudice or bias toward de-

fendant, in violation of subsection (C) of this canon; the negative feelings toward defendant by his fiancée's parents were not imputed to the trial judge. *Rudd v. State*, 2010 Ark. App. 784, — S.W.3d —, 2010 Ark. App. LEXIS 826 (Nov. 17, 2010).

Financial Activities.

A judge violated this canon of the Code of Judicial Conduct and §§ 21-8-203 and 21-8-204(b)(1) by failing to properly report his outside income and financial interests to the clerk of the Arkansas Supreme Court and the Secretary of State. *Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

Proper Sanction.

Where a judge engaged in the practice of law in violation of this rule after assuming the bench by continuing to represent a client in a probate matter that had begun when he was still a practicing attorney and by serving as the administrator of an estate of someone other than a family, the judge was suspended without pay for the remainder of his judicial term of office. The state supreme court rejected the recommendation of the Judicial

Discipline and Disability Commission that the judge be removed from the bench without the possibility of returning to that position by election or appointment because the judge's handling of the estate did not evidence a pattern of misconduct, there was no evidence that the judge engaged in other instances of practicing law, and the misconduct did not occur in the courtroom. *Judicial Discipline & Disability Comm'n v. Simes*, 2009 Ark. 543, 354 S.W.3d 72 (2009).

Recusal.

Circuit judge was reprimanded for violating Ark. Code Jud. Conduct Canons 2(A) and 3(B)(2) where the judge conducted Ark. R. Civ. P. 11 proceedings before the court attempted to determine the falsity of the allegations in a motion for recusal, and the court ultimately failed to establish that the allegations were false. *Ark. Judicial Discipline & Disability Comm'n v. Simes*, 2011 Ark. 193, — S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).

Cited: *Kuelbs v. Hill*, 2010 Ark. App. 427, — S.W.3d —, 2010 Ark. App. LEXIS 418 (May 12, 2010).

Rule 3.1. Extrajudicial Activities in General.

A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
- (B) participate in activities that will lead to frequent disqualification of the judge;
- (C) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;
- (D) engage in conduct that would appear to a reasonable person to be coercive; or
- (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.

COMMENT

[1] To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extra-

judicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

[2] Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

[3] Discriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call

into question the judge's integrity and impartiality. Examples include jokes or other remarks that demean individuals based upon their personal characteristics. For the same reason, a judge's extrajudicial activities must not be conducted in connection or affiliation with an organization that practices invidious discrimination. See Rule 3.6.

[4] While engaged in permitted extrajudicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending upon the circumstances, a judge's solicitation of contributions or memberships for an organization, even as permitted by Rule 3.7(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so to curry favor with the judge.

[5A] Before speaking or writing about social or political issues, judges should consider the impact of their statements. Comments may suggest that the judge lacks impartiality. See Rule 1.2. They may create the impression that a judge has or manifests bias or prejudice toward individuals with contrary social or political views. See Rule 2.3. Public comments may require the judge to disqualify himself or herself when litigation involving those issues comes before the judge. See Rule 2.11. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

Rule 3.2. Appearances before Governmental Bodies and Consultation with Government Officials.

A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:

(A) in connection with matters concerning the law, the legal system, or the administration of justice;

(B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or

(C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary capacity.

COMMENT

[1] Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.

[2] In appearing before governmental bodies or consulting with government officials, judges must be mindful that they remain subject to other provisions of this Code, such as Rule 1.3, prohibiting judges from using the prestige of office to advance their own or others' interests, Rule 2.10, governing public comment on pending and impending matters, and Rule 3.1(C), prohibiting judges from engaging in extrajudicial activities that would

appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

[3] In general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies or consulting with government officials on matters that are likely to affect them as private citizens, such as zoning proposals affecting their real property. In engaging in such activities, however, judges must not refer to their judicial positions, and must otherwise exercise caution to avoid using the prestige of judicial office.

Rule 3.3. Testifying as a Character Witness.

A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.

COMMENT

[1] A judge who, without being subpoenaed, testifies as a character witness abuses the prestige of judicial office to advance the inter-

ests of another. See Rule 1.3. Except in unusual circumstances where the demands of justice require, a judge should discourage a

party from requiring the judge to testify as a character witness.

Rule 3.4. Appointments to Governmental Positions.

A judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

COMMENT

[1] Rule 3.4 implicitly acknowledges the value of judges accepting appointments to entities that concern the law, the legal system, or the administration of justice. Even in such instances, however, a judge should assess the appropriateness of accepting an appointment, paying particular attention to the subject matter of the appointment and the availability and allocation of judicial resources, including the judge's time commit-

ments, and giving due regard to the requirements of the independence and impartiality of the judiciary.

[2] A judge may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, or cultural activities. Such representation does not constitute acceptance of a government position.

Rule 3.5. Use of Nonpublic Information.

A judge shall not intentionally disclose or use nonpublic information acquired in a judicial capacity for any purpose unrelated to the judge's judicial duties.

COMMENT

[1] In the course of performing judicial duties, a judge may acquire information of commercial or other value that is unavailable to the public. The judge must not reveal or use such information for personal gain or for any purpose unrelated to his or her judicial duties.

[2] This rule is not intended, however, to affect a judge's ability to act on information as necessary to protect the health or safety of the judge or a member of a judge's family, court personnel, or other judicial officers if consistent with other provisions of this Code.

Rule 3.6. Affiliation with Discriminatory Organizations.

(A) A judge shall not hold membership in any organization that practices invidious discrimination.

(B) A judge shall not use the benefits or facilities of an organization if the judge knows or should know that the organization practices invidious discrimination. A judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

COMMENT

[1] A judge's public manifestation of approval of invidious discrimination gives rise to the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary. A judge's membership in an organization that practices invidious discrimination creates the perception that the judge's impartiality is impaired.

[2] Invidious discrimination will generally

be demonstrated if an organization's exclusionary membership practices are arbitrary, irrational, or the result of hostility or animus toward an identifiable group. Whether an organization practices invidious discrimination is a complex question to which judges should be attentive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but

rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited.

[2A] A judge may ordinarily be a member of an organization which is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited, even though that organization is a single sex or single race organization. Likewise, a judge may ordinarily be a member of an organization which is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, even though in fact its membership is limited. Similarly, a judge may have or retain membership with a university

related or other living group, even though its membership is single sex. However, public approval of, or participation in, any discrimination that gives the appearance of impropriety and diminishes public confidence in the integrity and impartiality of the judiciary violates this Code. For example, an organization that conducts lobbying or advocacy on behalf of its members may raise such concerns. Ultimately, each judge must determine in the judge's own conscience whether participation in such an organization violates Rule 3.6.

[3] When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

[4] A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule.

[5] This Rule does not apply to national or state military service.

Rule 3.7. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities.

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;

(2) soliciting contributions for such an organization or entity, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority;

(3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, as long as the solicitation cannot reasonably be perceived as coercive;

(4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;

(5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and

(6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(B) A judge may encourage lawyers to provide pro bono publico legal services.

COMMENT

[1] The activities permitted by paragraph (A) generally include those sponsored by or undertaken on behalf of public or private not-for-profit educational institutions, and other not-for-profit organizations, including law-related, charitable, and other organizations.

[2] Even for law-related organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality.

[3] Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic orga-

nizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

[4] Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[5] In addition to appointing lawyers to serve as counsel for indigent parties in individual cases, a judge may promote broader access to justice by encouraging lawyers to participate in pro bono publico legal services, if in doing so the judge does not employ coercion, or abuse the prestige of judicial office. Such encouragement may take many forms, including providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work.

Rule 3.8. Appointments to Fiduciary Positions.

(A) A judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(B) A judge shall not serve in a fiduciary position if the judge as fiduciary will likely be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves, or one under its appellate jurisdiction.

(C) A judge acting in a fiduciary capacity shall be subject to the same restrictions on engaging in financial activities that apply to a judge personally.

(D) If a person who is serving in a fiduciary position becomes a judge, he or she must comply with this Rule as soon as reasonably practicable, but in no event later than one year after becoming a judge.

COMMENT

[1] A judge should recognize that other restrictions imposed by this Code may conflict with a judge's obligations as a fiduciary; in such circumstances, a judge should resign as fiduciary. For example, serving as a fiduciary

might require frequent disqualification of a judge under Rule 2.11 because a judge is deemed to have an economic interest in shares of stock held by a trust if the amount of stock held is more than de minimis.

Rule 3.9. Service as Arbitrator or Mediator.

A judge shall not act as an arbitrator or a mediator or perform other judicial functions apart from the judge's official duties unless expressly authorized by law.

COMMENT

[1] This Rule does not prohibit a judge from participating in arbitration, mediation, or settlement conferences performed as part of assigned judicial duties. Rendering dispute res-

olution services apart from those duties, whether or not for economic gain, is prohibited unless it is expressly authorized by law.

Rule 3.10. Practice of Law.

A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family, but is prohibited from serving as the family member's lawyer in any forum.

COMMENT

[1] A judge may act pro se in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with governmental bod-

ies. A judge must not use the prestige of office to advance the judge's personal or family interests. See Rule 1.3.

CASE NOTES**Practice of Law.**

A judge violated this canon when he continued to represent a client in out-of-state litigation after he ascended to the bench. *Judicial Discipline & Disability Comm'n v. Thompson*, 341 Ark. 253, 16 S.W.3d 212 (2000).

Rule 3.11. Financial, Business, or Remunerative Activities.

(A) A judge may hold and manage investments of the judge and members of the judge's family.

(B) A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in:

(1) a business closely held by the judge or members of the judge's family; or

(2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(C) A judge shall not engage in financial activities permitted under paragraphs (A) and (B) if they will:

(1) interfere with the proper performance of judicial duties;

(2) lead to frequent disqualification of the judge;

(3) involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves; or

(4) result in violation of other provisions of this Code.

COMMENT

[1] Judges are generally permitted to engage in financial activities, including manag-

ing real estate and other investments for themselves or for members of their families.

Participation in these activities, like participation in other extrajudicial activities, is subject to the requirements of this Code. For example, it would be improper for a judge to spend so much time on business activities that it interferes with the performance of judicial duties. See Rule 2.1. Similarly, it would be improper for a judge to use his or her official title or appear in judicial robes in business advertising, or to conduct his or her

business or financial affairs in such a way that disqualification is frequently required. See Rules 1.3 and 2.11.

[2] As soon as practicable without serious financial detriment, the judge must divest himself or herself of investments and other financial interests that might require frequent disqualification or otherwise violate this Rule.

Rule 3.12. Compensation for Extrajudicial Activities.

A judge may accept reasonable compensation for extrajudicial activities permitted by this Code or other law unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

COMMENT

[1] A judge is permitted to accept honoraria, stipends, fees, wages, salaries, royalties, or other compensation for speaking, teaching, writing, and other extrajudicial activities, provided the compensation is reasonable and commensurate with the task performed. The

judge should be mindful, however, that judicial duties must take precedence over other activities. See Rule 2.1.

[2] Compensation derived from extrajudicial activities may be subject to public reporting. See Rule 3.15.

Rule 3.13. Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value.

(A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality.

(B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:

(1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;

(2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending or impending before the judge would in any event require disqualification of the judge under Rule 2.11;

(3) ordinary social hospitality;

(4) commercial or financial opportunities and benefits, including special pricing and discounts, and loans from lending institutions in their regular course of business, if the same opportunities and benefits or loans are made available on the same terms to similarly situated persons who are not judges;

(5) rewards and prizes given to competitors or participants in random drawings, contests, or other events that are open to persons who are not judges;

(6) scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based upon the same terms and criteria;

(7) books, magazines, journals, audiovisual materials, and other resource materials supplied by publishers on a complimentary basis for official use; or

(8) gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, a domestic partner, or other family member of a judge residing in the judge's household, but that incidentally benefit the judge.

(C) Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

(1) gifts incident to a public testimonial;

(2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:

(a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or

(b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and

(3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

COMMENT

[1] Whenever a judge accepts a gift or other thing of value without paying fair market value, there is a risk that the benefit might be viewed as intended to influence the judge's decision in a case. Rule 3.13 imposes restrictions upon the acceptance of such benefits, according to the magnitude of the risk. Paragraph (B) identifies circumstances in which the risk that the acceptance would appear to undermine the judge's independence, integrity, or impartiality is low, and explicitly provides that such items need not be publicly reported. As the value of the benefit or the likelihood that the source of the benefit will appear before the judge increases, the judge is either prohibited under paragraph (A) from accepting the gift, or required under paragraph (C) to publicly report it.

[2] Gift-giving between friends and relatives is a common occurrence, and ordinarily does not create an appearance of impropriety or cause reasonable persons to believe that the judge's independence, integrity, or impartiality has been compromised. In addition, when the appearance of friends or relatives in a case would require the judge's disqualification under Rule 2.11, there would be no opportunity for a gift to influence the judge's decision making. Paragraph (B)(2) places no restrictions upon the ability of a judge to accept gifts or other things of value from

friends or relatives under these circumstances, and does not require public reporting.

[3] Businesses and financial institutions frequently make available special pricing, discounts, and other benefits, either in connection with a temporary promotion or for preferred customers, based upon longevity of the relationship, volume of business transacted, and other factors. A judge may freely accept such benefits if they are available to the general public, or if the judge qualifies for the special price or discount according to the same criteria as are applied to persons who are not judges. As an example, loans provided at generally prevailing interest rates are not gifts, but a judge could not accept a loan from a financial institution at below-market interest rates unless the same rate was being made available to the general public for a certain period of time or only to borrowers with specified qualifications that the judge also possesses.

[4] Rule 3.13 applies only to acceptance of gifts or other things of value by a judge. Nonetheless, if a gift or other benefit is given to the judge's spouse, domestic partner, or member of the judge's family residing in the judge's household, it may be viewed as an attempt to evade Rule 3.13 and influence the judge indirectly. Where the gift or benefit is

being made primarily to such other persons, and the judge is merely an incidental beneficiary, this concern is reduced. A judge should, however, remind family and household members of the restrictions imposed upon judges, and urge them to take these restrictions into

account when making decisions about accepting such gifts or benefits.

[5] Rule 3.13 does not apply to contributions to a judge's campaign for judicial office. Such contributions are governed by other Rules of this Code, including Rules 4.3 and 4.4.

Rule 3.14. Reimbursement of Expenses and Waivers of Fees or Charges.

(A) Unless otherwise prohibited by Rules 3.1 and 3.13(A) or other law, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition, and similar items, from sources other than the judge's employing entity, if the expenses or charges are associated with the judge's participation in extrajudicial activities permitted by this Code.

(B) Reimbursement of expenses for necessary travel, food, lodging, or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, when appropriate to the occasion, by the judge's spouse, domestic partner, or guest.

(C) A judge who accepts reimbursement of expenses or waivers or partial waivers of fees or charges on behalf of the judge or the judge's spouse, domestic partner, or guest shall publicly report such acceptance as required by Rule 3.15.

COMMENT

[1] Educational, civic, religious, fraternal, and charitable organizations often sponsor meetings, seminars, symposia, dinners, awards ceremonies, and similar events. Judges are encouraged to attend educational programs, as both teachers and participants, in law-related and academic disciplines, in furtherance of their duty to remain competent in the law. Participation in a variety of other extrajudicial activity is also permitted and encouraged by this Code.

[2] Not infrequently, sponsoring organizations invite certain judges to attend seminars or other events on a fee-waived or partial-fee-waived basis, and sometimes include reimbursement for necessary travel, food, lodging, or other incidental expenses. A judge's decision whether to accept reimbursement of expenses or a waiver or partial waiver of fees or charges in connection with these or other extrajudicial activities must be based upon an assessment of all the circumstances. The judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment about whether acceptance would be consistent with the requirements of this Code.

[3] A judge must assure himself or herself that acceptance of reimbursement or fee waivers would not appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. The factors

that a judge should consider when deciding whether to accept reimbursement or a fee waiver for attendance at a particular activity include:

(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity;

(b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content;

(c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge;

(d) whether the activity is primarily educational rather than recreational, and whether the costs of the event are reasonable and comparable to those associated with similar events sponsored by the judiciary, bar associations, or similar groups;

(e) whether information concerning the activity and its funding sources is available upon inquiry;

(f) whether the sponsor or source of funding is generally associated with particular parties or interests currently appearing or likely to appear in the judge's court, thus possibly requiring disqualification of the judge under Rule 2.11;

(g) whether differing viewpoints are presented; and

(h) whether a broad range of judicial and nonjudicial participants are invited, whether a large number of participants are invited, and whether the program is designed specifically for judges.

[4A] Reimbursement of expenses from governmental entities need not be reported under Rule 3.14 [C] or Rule 3.15.

Rule 3.15. Reporting Requirements.

(A) A judge shall publicly report the amount or value of:

(1) compensation received for extrajudicial activities as permitted by Rule 3.12;

(2) gifts and other things of value as permitted by Rule 3.13(C), and

(3) reimbursement of expenses and waiver of fees or charges as permitted by Rule 3.14(A).

(B) The scope of reporting, the time for reporting, the manner of reporting, and other issues shall be as determined by state law.

CANON 4

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY

RESEARCH REFERENCES

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CASE NOTES

Findings.

Judicial Discipline and Disability Commission had the opportunity to consider the sworn statements by two attorneys, each of whom stated that the judge personally asked for a campaign contribution, and the judge also testified before the Judicial Commission, allowing the Judicial Commission to view his demeanor and to evaluate his testimony first

hand; with this evidence, the Judicial Commission found that there had been conduct that was, or might be, or might become cause for discipline, and determined that an admonition was appropriate; thus, its findings were not clearly erroneous based on the evidence. *Simes v. Ark. Judicial Discipline & Disability Comm'n*, 368 Ark. 577, 247 S.W.3d 876 (2007).

Rule 4.1. Political and Campaign Activities of Judges and Judicial Candidates in General.

(A) Except as permitted by law, or by Rules 4.2, 4.3, and 4.4, a judge or a judicial candidate shall not:

- (1) act as a leader in, or hold an office in, a political organization;
- (2) make speeches on behalf of a political organization;
- (3) publicly endorse or oppose a candidate for any public office;
- (4) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
- (5) [Reserved]
- (6) publicly identify himself or herself as a candidate of a political organization;
- (7) seek, accept, or use endorsements from a political organization;
- (8) personally solicit or accept campaign contributions other than through a campaign committee authorized by Rule 4.4;
- (9) use or permit the use of campaign contributions for the private benefit of the judge, the candidate, or others;
- (10) use court staff, facilities, or other court resources in a campaign for judicial office;
- (11) knowingly, or with reckless disregard for the truth, make any false or misleading statement;
- (12) make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court; or
- (13) in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

(B) A judge or judicial candidate shall take reasonable measures to ensure that other persons do not undertake, on behalf of the judge or judicial candidate, any activities prohibited under paragraph (A).

COMMENT**GENERAL CONSIDERATIONS**

[1] Even when subject to public election, a judge plays a role different from that of a legislator or executive branch official. Rather than making decisions based upon the expressed views or preferences of the electorate, a judge makes decisions based upon the law and the facts of every case. Therefore, in furtherance of this interest, judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure. This Canon imposes narrowly tailored restrictions upon the political and campaign activities of all judges and judicial candidates, taking into account the various methods of selecting judges.

[2] When a person becomes a judicial candidate, this Canon becomes applicable to his or her conduct.

PARTICIPATION IN POLITICAL ACTIVITIES

[3] Public confidence in the independence and impartiality of the judiciary is eroded if judges or judicial candidates are perceived to be subject to political influence. Although judges and judicial candidates may register to vote as members of a political party, they are prohibited by paragraph (A)(1) from assuming leadership roles in political organizations.

[4] Paragraphs (A)(2) and (A)(3) prohibit judges and judicial candidates from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office, respectively, to prevent them from abusing the prestige of judicial office to advance the interests of others. See Rule 1.3. These Rules do not prohibit candidates from campaigning on their own behalf, or from endorsing or opposing candidates for the

same judicial office for which they are running. See Rules 4.2(B)(2) and 4.2(B)(3).

[5] Although members of the families of judges and judicial candidates are free to engage in their own political activity, including running for public office, there is no "family exception" to the prohibition in paragraph (A)(3) against a judge or candidate publicly endorsing candidates for public office. A judge or judicial candidate must not become involved in, or publicly associated with, a family member's political activity or campaign for public office.

[6] Judges and judicial candidates retain the right to participate in the political process as voters in both primary and general elections. Judges are permitted to request a ballot in a party's primary without violating this Code.

[6A] Judges are permitted to attend or purchase tickets for dinners or other events sponsored by a political organization.

**STATEMENTS AND COMMENTS MADE
DURING A CAMPAIGN FOR JUDICIAL
OFFICE**

[7] Judicial candidates must be scrupulously fair and accurate in all statements made by them and by their campaign committees. Paragraph (A)(11) obligates candidates and their committees to refrain from making statements that are false or misleading, or that omit facts necessary to make the communication considered as a whole not materially misleading.

[8] Judicial candidates are sometimes the subject of false, misleading, or unfair allegations made by opposing candidates, third parties, or the media. For example, false or misleading statements might be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or misleading allegations may be made that bear upon a candidate's integrity or fitness for judicial office. As long as the candidate does not violate paragraphs (A)(11), (A)(12), or (A)(13), the candidate may make a factually accurate public response. In addition, when an independent third party has made unwarranted attacks on a candidate's opponent, the candidate may disavow the attacks, and request the third party to cease and desist.

[9] Subject to paragraph (A)(12), a judicial candidate is permitted to respond directly to false, misleading, or unfair allegations made against him or her during a campaign, although it is preferable for someone else to respond if the allegations relate to a pending case.

[10] Paragraph (A)(12) prohibits judicial candidates from making comments that might impair the fairness of pending or impending judicial proceedings. This provision does not restrict arguments or statements to

the court or jury by a lawyer who is a judicial candidate, or rulings, statements, or instructions by a judge that may appropriately affect the outcome of a matter.

**PLEDGES, PROMISES, OR
COMMITMENTS INCONSISTENT WITH
IMPARTIAL PERFORMANCE OF THE
ADJUDICATIVE DUTIES OF JUDICIAL
OFFICE**

[11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

[12] Paragraph (A)(13) makes applicable to both judges and judicial candidates the prohibition that applies to judges in Rule 2.10(B), relating to pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result.

[13A] Before speaking or announcing personal views on social or political topics in a judicial campaign, candidates should consider the impact of their statements. Such statements may suggest that the judge lacks impartiality. See Rule 1.2. They may create the impression that a judge has or manifests bias or prejudice toward individuals with contrary social or political views. See Rule 2.3. Public comments may require the judge to disqualify himself or herself when litigation involving those issues come before the judge. See Rule 2.11. When making such statements, a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.

[14] A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or advocating for more funds to improve the physical plant and amenities of the courthouse.

[15] Judicial candidates may receive ques-

tionnaires or requests for interviews from the media and from issue advocacy or other community organizations that seek to learn their views on disputed or controversial legal or political issues. Paragraph (A)(13) does not specifically address judicial responses to such inquiries. Depending upon the wording and format of such questionnaires, candidates' responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating paragraph (A)(13),

therefore, candidates who respond to media and other inquiries should also give assurances that they will keep an open mind and will carry out their adjudicative duties faithfully and impartially if elected. Candidates who do not respond may state their reasons for not responding, such as the danger that answering might be perceived by a reasonable person as undermining a successful candidate's independence or impartiality, or that it might lead to frequent disqualification. See Rule 2.11.

Rule 4.2. Political and Campaign Activities of Judicial Candidates in Public Elections.

(A) A judicial candidate in a public election shall:

(1) act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary;

(2) comply with all applicable election, election campaign, and election campaign fund-raising laws and regulations of this jurisdiction;

(3) review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee, as authorized by Rule 4.4, before their dissemination; and

(4) take reasonable measures to ensure that other persons do not undertake on behalf of the candidate activities, other than those described in Rule 4.4, that the candidate is prohibited from doing by Rule 4.1.

(B) A judicial candidate in a public election may, unless prohibited by law, and not earlier than 365 days before the first applicable election:

(1) establish a campaign committee pursuant to the provisions of Rule 4.4;

(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;

(3) [Reserved]

(4) attend or purchase tickets for dinners or other events sponsored by a political organization;

(5) seek, accept, or use endorsements from any person or organization other than a partisan political organization; and

(6) [Reserved].

(C) [Reserved].

COMMENT

[1] Paragraph (B) permits judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities earlier than 365 days before the first applicable election. See definition of "judicial candidate," which provides that a person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes or engages in solicitation or acceptance of contributions or support.

This rule does not prohibit private conversations with potential supporters by a potential candidate as part of an effort to "test the waters" for a future candidacy. It does prohibit establishing a campaign committee earlier than 365 days before the election date.

[2] Despite paragraph (B), judicial candidates for public election remain subject to many of the provisions of Rule 4.1. For example, a candidate continues to be prohibited from soliciting funds for a political organization, knowingly making false or misleading statements during a campaign, or making

certain promises, pledges, or commitments related to future adjudicative duties. See Rule 4.1(A), paragraphs (4), (11), and (13).

[3] [Reserved]

[4] In nonpartisan elections, paragraph (B)(5) prohibits a candidate from seeking, accepting, or using nominations or endorsements from a partisan political organization.

[5] Subject to the 365 day limitation, judi-

cial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations. (Cf. Rule 4.1, Comment 6A, Judges are permitted to attend or purchase tickets for dinners or other events sponsored by a political organization.)

[6] [Reserved]

[7] [Reserved]

Rule 4.3. Activities of Candidates for Appointive Judicial Office.

A candidate for appointment to judicial office may:

(A) communicate with the appointing or confirming authority, including any selection, screening, or nominating commission or similar agency; and

(B) seek endorsements for the appointment from any person or organization other than a partisan political organization.

COMMENT

[1] When seeking support or endorsement, or when communicating directly with an appointing or confirming authority, a candidate for appointive judicial office must not make

any pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rule 4.1(A)(13).

Rule 4.4. Campaign Committees.

(A) A judicial candidate subject to public election may establish a campaign committee to manage and conduct a campaign for the candidate, subject to the provisions of this Code. The candidate is responsible for ensuring that his or her campaign committee complies with applicable provisions of this Code and other applicable law.

(B) A judicial candidate subject to public election shall direct his or her campaign committee:

(1) to solicit and accept only such campaign contributions as are permitted by state law.

(2) not to solicit or accept contributions for a candidate's current campaign more than 180 days before the applicable election, nor more than 45 days after the last election in which the candidate participated; and

(3) to comply with all applicable statutory requirements for disclosure and divestiture of campaign contributions.

(C) Any campaign fund surplus shall be returned to the contributors or turned over to the State Treasurer as provided by law.

COMMENT

[1] Judicial candidates are prohibited from personally soliciting campaign contributions or personally accepting campaign contributions. See Rule 4.1(A)(8). This Rule recognizes that in many jurisdictions, judicial candidates must raise campaign funds to support their candidacies, and permits candidates, other than candidates for appointive judicial office, to establish campaign committees to solicit and accept reasonable financial contributions or inkind contributions.

[2] Campaign committees may solicit and accept campaign contributions, manage the

expenditure of campaign funds, and generally conduct campaigns. Candidates are responsible for compliance with the requirements of election law and other applicable law, and for the activities of their campaign committees.

[2A] The forty-five day post-election restriction applies both to contested and non-contested elections. Once a candidate's campaign has ended, the candidate should only raise funds for 45 more days. For example, if three candidates participate in a judicial election, the candidate who is eliminated may raise funds for only an additional 45 days. How-

ever, the two remaining candidates may continue to raise funds through the runoff election and 45 days thereafter.

[3] At the start of a campaign, the candidate must instruct the campaign committee to solicit or accept only such contributions as are reasonable in amount, appropriate under the circumstances, and in conformity with applicable law.

[3A] To reduce potential disqualification and to avoid the appearance of impropriety, judicial candidates should, as much as possible, not be aware of those who have contributed to the campaign.

Rule 4.5. Activities of Judges Who Become Candidates for Nonjudicial Office.

(A) Upon becoming a candidate for a nonjudicial elective office, a judge shall resign from judicial office, unless permitted by law to continue to hold judicial office.

(B) Upon becoming a candidate for a nonjudicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

COMMENT

[1] In campaigns for nonjudicial elective public office, candidates may make pledges, promises, or commitments related to positions they would take and ways they would act if elected to office. Although appropriate in nonjudicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning

for nonjudicial elective office, together dictate that a judge who wishes to run for such an office must resign upon becoming a candidate.

[2] The “resign to run” rule set forth in paragraph (A) ensures that a judge cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election. When a judge is seeking appointive nonjudicial office, however, the dangers are not sufficient to warrant imposing the “resign to run” rule.

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RULES OF PROCEDURE OF THE ARKANSAS JUDICIAL DISCIPLINE AND DISABILITY COMMISSION

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2. Powers and duties of the Commission.
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10. Interim sanctions.
 11. *Ex parte* communications
 12. Supreme Court review.
 13. Cases involving allegations of mental and physical disability.
 14. Involuntary retirement.
 15. Complaints shall be adjudicated or dismissed within 18 months.
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Publisher's Notes. The May 8, 1989 Per Curiam read: "In the General Election held November 8, 1988, the people of Arkansas adopted Ark. Const. Amend. 66 which created the Arkansas Judicial Discipline and Disability Commission. The general assembly adopted Act 637 of 1988 [1989] expanding upon the provisions of the amendment and stating,

as permitted by the amendment, the grounds for suspension and removal of judges. Subsection (f) of the amendment provides: 'Rules: The Supreme Court shall make procedural rules implementing this amendment and setting the length of terms on the Commission.' The following rules for the Commission are hereby promulgated."

RESEARCH REFERENCES

U. Ark. Little Rock L.J. Survey, Professional Responsibility, 13 U. Ark. Little Rock L.J. 393.

CASE NOTES

Sovereign Immunity.

A suit against the Commission on Judicial Discipline and Disability, seeking only a declaration whether the Commission, acting through its Director, has acted in violation of Rule of Procedure of the Arkansas Judicial

Discipline and Disability Commission, is not barred by the sovereign immunity provision of Ark. Const., Art 5, § 20. Commission on Judicial Discipline & Disability v. Digby, 303 Ark. 24, 792 S.W.2d 594 (1990).

Rule 1. Organization of Commission.

A. *Composition of Commission.* In accordance with Ark. Const. Amend. 66 and Act 637 of 1989, the Commission on Judicial Discipline and Disability shall have nine members who shall be residents of Arkansas. Three members shall be justices or judges appointed by the Supreme Court (judicial members); three shall be lawyers admitted to practice in this state, who are not justices or judges, one appointed by the Attorney General, one

by the President of the Senate, and one by the Speaker of the House of Representatives (lawyer members); and three members who are neither lawyers nor sitting or retired justices or judges shall be appointed by the Governor (public members).

B. *Meetings.* The Commission shall hold an organization meeting immediately upon establishment and biannually thereafter, and shall meet at least monthly at announced dates and places, except when there is no business to be conducted. Meetings shall be called by the Chair or upon the written request of three members of the Commission.

C. *Terms of Commission Members and Alternates.* With the exception of the initial appointees, whose initial terms shall be made so that reappointments and later appointments are to be staggered, Commission members and alternates shall serve for terms of six (6) years and shall be eligible for reappointment to second full terms. (Initial appointees shall be eligible for second terms of six (6) years.) At its organization meeting, the members of the Commission shall draw for lengths of initial terms so that one member in each group of members, judicial, lawyer, and public, shall have a four (4) year initial term, one member in each group shall have a five (5) year term, and one member in each group shall have a six (6) year term. After the terms of the initial appointees have been established, slips of paper, each with the name of the alternate, shall be placed in a container. Each member shall draw one of the slips of paper, and the alternate whose name is thus drawn shall have the same length of term as the member who drew his or her name.

D. *Officers.* At the organization meeting the members of the Commission shall elect one among them to serve as chair and another to serve as vice-chair. The vice-chair shall perform the duties of the chair whenever he is absent or unable to act.

E. *Quorum; Voting Requirements.* Five members of the Commission shall constitute a quorum for the transaction of business. A finding of probable cause shall require the concurrence of a majority of the members present.

Any alternate member may serve in the place of any member of the same category whenever such member is disqualified or unable to serve and upon the call of, or on behalf of, the chair. An alternate member who is present at a Commission meeting but who has not been called to serve may neither be included in a quorum count nor vote on any matter being considered at such meeting. Whenever an alternate member is called to serve in the place of a member of the Commission, an announcement with respect thereto shall be made at the commencement of the meeting.

A recommendation that discipline be imposed shall require the concurrence of a majority of the members of the Commission.

F. *Investigation Panels and Hearing Panels.* The initial review and investigation of complaints shall be conducted by and at the direction of an Investigation Panel, which shall act only by majority vote of the Panel. At the regular organization meetings of the Commission, the chair shall appoint from the nine Commission members and nine Alternates no fewer than three Investigation Panels of three members, each consisting of one judicial member, one lawyer member, and one public member. Thus constituted, these Investigation Panels shall conduct and direct the initial review and investigation of complaints without the knowledge or involvement of the Commission whose members shall serve as the Hearing Panel and conduct the formal proceedings to inquire into charges against a judge.

Complaints shall be allocated among the Investigation Panels in rotation. No Commission member or Alternate shall serve on a Hearing Panel involving any matter considered by an Investigation Panel of which he or she was a member. (Amended July 6, 1992; amended March 13, 2008.)

Publisher's Notes. Acts 1989, No. 637, referred to in this rule, is codified as § 16-10-401 et seq.

Rule 2. Powers and duties of the Commission.

A. *Rules and Forms.* The Commission may recommend to the Supreme Court adoption or amendment of rules with regard to all disciplinary and disability proceedings, promulgate additional rules of procedure not inconsistent with these rules, and require the use of appropriate forms.

B. *Annual Report.* The Commission shall have prepared an annual report of its activities for presentation to the Supreme Court and the public at the end of each calendar year.

Rule 3. Financial arrangements for Commission.

A. *Compensation Proscribed.* The Commission members shall serve without compensation for their services.

B. *Expenses Allowed.* The Commission members shall be reimbursed for expenses necessarily incurred in the performance of their duties.

C. *Authorization for Payments.* Expenses of the Commission as provided in section 2.(d) of Act 637 of 1989, shall be authorized to be paid in accordance with the approved Commission budget.

Publisher's Notes. Section 2.(d) of Act 637 of 1989, referred to in subsection C., is codified as § 16-10-402.

Rule 4. Commission office.

The Commission shall establish a permanent office in a building open to the public. The office shall be open and staffed at announced hours.

Rule 5. Duties of the director.

The Commission shall prescribe the duties and responsibilities of the director which shall include the authority to:

- (1) Consider information from any source and receive allegations and complaints;
- (2) Make preliminary evaluations;
- (3) Screen complaints;
- (4) Conduct investigations;
- (5) Maintain and preserve the Commissions records, including all complaints, files and written dispositions;
- (6) Maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;
- (7) Prepare the Commission's budget for its approval and administer its funds;
- (8) Employ and supervise other members of the Commission's staff;

(9) Prepare an annual report of the Commission's activities; and

(10) Employ, with the approval of the Commission, special counsel, private investigators or other experts as necessary to investigate and process matters before the Commission and before the Supreme Court.

Rule 6. Jurisdiction.

The Commission shall administer the judicial discipline and disability system, and perform such duties as are required to enforce these rules. The Commission shall have jurisdiction over any "judge" regarding allegations of misconduct or disability, pursuant to the limitations set forth below.

A. *Establishment of Grounds for Discipline.* The grounds for discipline are those established in part (b) of Ark. Const. Amend. 66 and those established by Act 637 of 1989.

B. *Distinguished from Appeal.* In the absence of fraud, corrupt motive or bad faith, the Commission shall not take action against a judge for making findings of fact, reaching a legal conclusion or applying the law as he or she understands it. Claims of error shall be considered only in appeals from court proceedings.

C. *Judge-in-Office.* As used in this section, "judge" is anyone, whether or not a lawyer, who is an officer of the judicial system and who is eligible to perform judicial functions, including a justice, magistrate, court commissioner, special master, referee, whether full-time or part-time. The Commission shall have jurisdiction over allegations of misconduct occurring prior to or during service as a judge, and regarding issues of disability during service as a judge.

D. *Former Judge.* The Commission has continuing jurisdiction over any former judge regarding allegations of misconduct occurring before or during service as a judge, provided that a complaint is received within one year of the person's last service as a judge unless the person has actively concealed material facts giving rise to the complaint.

E. *Overlapping Jurisdiction.* Nothing in these rules, or in the provisions regarding jurisdiction of the Commission, shall be construed as limiting in any way the jurisdiction of the Arkansas Supreme Court Committee on Professional Conduct. (Amended March 13, 2008.)

Rule 7. Disclosure.

A. Any action taken by the Commission after investigation of a judge shall be communicated to the judge by letter which shall become public information. If the allegations leading to the investigation have proven to be groundless, the letter to the judge shall so state.

B. If the Commission finds it necessary to file a formal statement of allegations against a judge and to proceed to a hearing, the statement of allegations and the hearing shall be open to the public as shall the records of formal proceedings. The Commission may, however, conduct its deliberations in executive session which shall not be open to the public. Any decision reached by the Commission in such an executive session shall be announced in a session open to the public.

C. Investigatory records, files, and reports of the Commission shall be confidential, and no disclosure of information, written, recorded, or oral, received or developed by the Commission in the course of an investigation

relating to alleged misconduct or disability of a judge, shall be made except as stated in A. and B. above or as follows:

(1) Upon waiver in writing by the judge under consideration at the formal statement of allegations stage of the proceedings;

(2) Upon inquiry by an appointing authority or by a state or federal agency conducting investigations on behalf of such authority in connection with the selection or appointment of judges;

(3) In cases in which the subject matter or the fact of the filing of charges has become public, if deemed appropriate by the Commission, it may issue a statement in order to confirm the pendency of the investigation, to clarify the procedural aspects of the proceedings, to explain the right of the judge to a fair hearing, and to state that the judge denies the allegations;

(4) Upon inquiry in connection with the assignment or recall of a retired judge to judicial duties, by or on behalf of the assigning authority;

(5) Where the circumstances necessitating the initiation of an inquiry include notoriety, or where the conduct in question is a matter of public record, information concerning the lack of cause to proceed shall be released by the Commission;

(6) If during the course of or after an investigation or hearing the Commission reasonably believes that there may have been a violation of any rules of professional conduct of attorneys at law, the Commission may release such information to any committee, commission, agency or body within or outside the State empowered to investigate, regulate or adjudicate matters incident to the legal profession; or

(7) If during the course of or after an investigation or hearing, the Commission reasonably believes that there may have been a violation of criminal law, the Commission shall release such information to the appropriate prosecuting attorney.

D. It shall be the duty of the Commission and its staff to inform every person who appears before the Commission or who obtains information about the Commission's work of the confidentiality requirements of this rule.

E. Any person who knowingly violates the confidentiality requirements of this rule shall be subject to punishment for contempt of the Arkansas Supreme Court. (Amended May 14, 1990; amended July 12, 1993; amended March 13, 2008.)

Publisher's Notes. The Per Curiam order of the Supreme Court dated May 14, 1990, read:

"Our per curiam order of May 8, 1989, 'In the Matter of Rules of Procedure of the Arkansas Judicial Discipline and Disability Commission,' promulgated rules of procedure for the commission. Rule 7. provided that the commission would make no disclosure of information under the provisions of Act 637 of 1989 'except in accordance with procedures approved by the Supreme Court and upon reasonable notice to any judge concerned.'

"Section 2.(g) of Act 637 provided some basic rules with respect to disclosure. Those rules were apparently taken from the 'Model Rules for Judicial Discipline and Disability Retirement' published in 1979 by the American Bar Association. Before quoting those

rules as the ones to be 'approved by' this court, we wanted a thorough study of the rules of other states so that we might reach an independent determination of the conditions under which disclosure of the commission's business should and should not be made. The Administrative Office of the Courts undertook such a study. The report we received was compiled after looking at the laws in all other states. That exhaustive study and report plus our own study of relevant case law and authoritative articles on this subject were used to reach the results set out in this per curiam order.

"When adopting and implementing laws and rules that provide for a judicial discipline system, we are confronted with the issue as to when in the process or proceedings does the right to constitutional access attach. Every

state in the Union recognizes that some confidentiality is necessary, and from our research, we have found that all states, except the State of Washington, provide for disclosure in all judicial discipline cases only after probable cause has been determined and some type of formal hearing or charge has been completed or filed. See *J. Shaman and Y. Beque, Silence Isn't Always Golden*, 58 Temp. L.Q. 755, 756 (1985). [Footnote omitted.] The Supreme Court in *Landmark Communities, Inc. v. Virginia*, 435 U.S. 829 (1978), set out the three reasons or functions for confidentiality in these matters. They are listed as follows:

"1. To protect complainants and witnesses from possible recrimination until the validity of the complaint has been ascertained;

"2. To protect a judge's reputation from the adverse publicity which might flow from frivolous complaints;

"3. To maintain confidence in the judicial system by preventing the premature disclosure of a complaint before the commission has determined that the charge is well-founded. See also *First Amendment Coalition v. Judicial Inquiry & Review*, 784 F.2d 467 (3rd Cir. 1986); *W. Braithwaite, Who Judges the Judges?*, 161-162 (1971); *Buckley, The Commission on Judicial Qualification: An Attempt to Deal with Judicial Misconduct*, 3 U. San Fran. L. Rev. 244 (1969).

"When considering the conduct and treatment of governmental officers, the reality is that only judges are subjected to such disciplinary procedures, see *First Amendment Coalition*, 784 F.2d at 447, and the most worrisome concern evidenced in recent years has been how to balance the state's concerns (as listed above in the *Landmark* decision) against those of public disclosure. We have considered these concerns, and have concluded that the disclosure provisions recently adopted by the State of Washington maintain a more open system of judicial discipline. At the same time, we believe Washington's rules acknowledge the vital and substantial interests of the state. See W.A.C. 292-08-050 (1990).

"We first considered the ABA Model Rules for Judicial Discipline and Disability Retirement, since they have been adopted in a number of states. However, under those Model Rules, a commission has the wide discretion to reprimand a judge in private even

though it determines probable cause exists that a judge has violated the Code of Judicial Conduct or has been guilty of some other form of judicial misconduct. While such misconduct, under the Model Rules, is not disclosed to the general public, a commission may disclose information concerning a judge to a state or federal agency connected with the selection or appointment of judges. Of course, in Arkansas, judges are elected by the people. Thus, the question arises as to whether a commission's probable cause determination of a judge's misconduct should be disclosed to the people, since they, in a sense, are the 'appointing authority' in this state. Common sense and logic suggest such information should be made public when probable cause is determined.

"Although we adopt a procedure that omits private reprimands, we still are left with a judicial discipline system that maintains confidentiality during the investigative period, which is when the judge, witnesses and complaining parties require confidentiality the most. In reaching this result, we must vary somewhat the commission's existing confidentiality provisions which are essentially those set out in the ABA Model Rules and adopted by our General Assembly. Section 2.(g) of Act 637.

"First, we have decided to alter our May 8, 1989, order to do away with the 'private reprimand.' Second, we have decided that anytime the commission takes official action with respect to a complaint about a judge the matter should be open to public knowledge. If the commission decides on action short of the filing of formal charges against a judge its letter to the judge containing an admonition or suggested adjustment shall be open to public inquiry. The letter shall contain all material facts relating to the proceeding and the conduct of the judge as well as any admonition or adjustment, including any terms and conditions, imposed by the commission. We have thus removed the confidentiality provisions with respect to actions taken which fall short of the filing of formal charges. Records of the commission's investigations leading to an admonition or adjustment will remain confidential, absent waiver by the judge or one of the other exceptions stated in Rule 7., but the action taken by the commission will not."

CASE NOTES

ANALYSIS

Applicability.
Hearings.

Applicability.

Applying the general rule of prospectivity which governs interpretation of statutes, the application of the May 14, 1990, version of this rule is prospective, and thus the Judicial Discipline and Disability Commission is not required to divulge its actions prior to that time which were protected under the former rule and statute. *Gannett River States Publishing Co. v. Arkansas Judicial Discipline &*

Disability Comm'n, 304 Ark. 244, 801 S.W.2d 292 (1990).

Hearings.

Where a judge has waived confidentiality without any countervailing reason to close the formal meeting presented by the Arkansas Judicial Discipline and Disability Commission, the formal probable-cause meeting had to be open. *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 368 Ark. 557, 247 S.W.3d 816 (2007).

Cited: *Commission on Judicial Discipline & Disability v. Digby*, 303 Ark. 24, 792 S.W.2d 594 (1990).

Rule 8. Procedures of Commission regarding conduct of a judge.

A. *Initiation of Inquiry.* In accordance with these rules, any sworn or verified complaint brought to the attention of the Commission stating facts that, if true, would be grounds for discipline, shall be good cause to initiate an inquiry relating to the conduct of a judge. The Commission on its own motion may make inquiry with respect to the conduct of a judge.

All complaints shall bear the name of the complainant, unless anonymous or based upon media reports. If the complaint is anonymous or based upon a media report, it shall be signed by the Executive Director, but not sworn. If the Executive Director, an individual staff member, Commissioner member or Alternate files, solicits, or initiates a complaint, he or she shall sign the sworn complaint.

All contacts with potential witnesses shall be in accordance with these Rules.

B. *Screening.* The Executive Director shall dismiss all complaints that are clearly outside of the Commission's jurisdiction. A report as to matters so dismissed shall be furnished to the Commission at its next meeting. The complainant, if any, and the judge shall be informed in writing of the dismissal.

C. *Investigation of Complaints.* All complaints not summarily dismissed by the Executive Director shall then be presented to an Investigation Panel. The Investigation Panel shall dismiss all complaints for which sufficient cause to proceed is not found by that Panel. If the complaint is not dismissed, the Panel shall then direct the staff to make a prompt, discreet, and confidential investigation. In no instance may the staff undertake any investigation or make any contact with anyone other than the complainant and the judge unless authorized to do so by the Investigation Panel. Upon completion, the Panel shall review the findings from the investigation. The Panel shall dismiss all complaints for which sufficient cause to proceed is not found. A report as to matters so dismissed shall be furnished to the Commission at its next meeting. The complainant and the judge shall be informed in writing of the dismissal.

D. *Mandatory Notice to the Judge.* If a complaint, or any portion of it, is not dismissed by the Investigation Panel following the discreet and confidential investigation, then the Panel shall notify the judge in writing immediately of those portions of the complaint that the Panel has concluded warrant further examination and attention. The judge shall receive the

complaint, or any portion of the complaint that is not dismissed, along with any information prepared by or for the Panel or staff to enable the judge to adequately respond to the issues in the complaint. The judge shall be invited to respond to each of the issues from the complaint that the Panel has identified as possible violations of the Arkansas Code of Judicial Conduct.

The time for the judge to respond shall be within 30 days unless shortened or enlarged by the Investigation Panel for good cause.

E. *Dismissal or Formal Statement of Allegations.* The Investigation Panel may dismiss the complaint with notice to the complainant and the judge, or it may direct a formal statement of allegations citing specific provisions of the Code of Judicial Conduct alleged to have been violated and the specific facts offered in support the alleged violation(s) be prepared and served on the responding judge along with all materials prepared by the Panel or staff. Service may be by any means provided for service of process in the Arkansas Rules of Civil Procedure.

F. *Answer.* The judge shall file a written answer with the Executive Director within thirty (30) days after the service upon him/her of the statement of allegations, unless such time is enlarged by the Executive Director. The answer may include a description of circumstances of a mitigating nature bearing on the charge. (Amended March 16, 1992; amended July 1, 1993; amended March 13, 2008.)

CASE NOTES

Cited: Griffen v. Ark. Judicial Discipline & Disability Comm'n, 266 F. Supp. 2d 898 (E.D. Ark. 2003); Ark. Judicial Discipline & Disability Comm'n v. Simes, 2011 Ark. 193, — S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).

Rule 9. Hearing on formal statement of allegations.

A. *Hearing.* The hearing on a formal statement of allegations prepared against a judge shall be before a Hearing Panel comprised of a full nine-member Commission on which no member of the Investigation Panel which considered the initial complaint may serve. This same nine-member Hearing Panel shall be the only panel to hear the particular allegations, whether the hearing is recessed, continued, or requires more than one day.

B. *Scheduling.* The Commission shall, upon the receipt of the judge's response or upon expiration of the time to answer, schedule a public hearing to commence within 90 days thereafter, unless continued for good cause shown. The judge and all counsel shall be notified promptly of the date, time and place of the hearing.

C. *Discovery.* The respondent judge and the Commission shall be entitled to discovery in accordance with the Arkansas Rules of Civil Procedure. Both the Commission and the respondent judge shall have the authority to issue summonses for any persons and subpoenas for any witnesses, and for the production of papers, books, accounts, documents, records, or other evidence and testimony relevant to an investigation or proceeding. The summonses or subpoenas shall be served in any manner provided by the Arkansas Rules of Civil Procedure for service of process. Any fees or expenses incurred for issuing or service of subpoenas or summonses shall be borne by the requesting party. The Circuit Court of Pulaski County shall have the power to enforce process.

D. *Right to Counsel.* The judge shall be entitled to counsel of his/her own choice at his or her own expense.

E. *Conduct of Hearing.* The Arkansas Rules of Evidence shall apply and all testimony shall be under oath. Commission attorneys, or special counsel retained for the purpose, shall present the case to the fact finder. The judge whose conduct is in question shall be permitted to adduce evidence and cross examine witnesses. Facts justifying action shall be established by clear and convincing evidence. The proceedings shall be recorded verbatim.

F. *Immunity from Prosecution.* The Commission and the judge are authorized to request from the appropriate prosecuting authorities immunity from criminal prosecution for a reluctant witness, using the procedure outlined in Ark. Code Ann. § 16-43-601, et seq.

G. *Public Hearing.* The hearing shall be open to the public and recorded by a certified court reporter.

H. *Determination.* The Commission shall, within sixty (60) days after the hearing, submit its finding and recommendations, together with the record and transcript of the proceedings. Both the decision of the Commission and a copy of the record shall be served upon the judge.

I. *Disposition.* In its report, the Commission shall dispose of the case in one of the following ways: (1) If it finds that there has been no misconduct, the complaint shall be dismissed and the Director shall send the judge and each complainant notice of dismissal; (2) If it finds that there has been conduct that is cause for discipline but for which an admonishment or informal adjustment is appropriate, it may so inform or admonish the judge, direct professional treatment, counseling, or assistance for the judge, or impose conditions on the judge's future conduct; and (3) If it finds there has been conduct that is cause for formal discipline, it shall be imposed as set forth in Rule 9. J.

J. *Commission Decision — Formal Discipline.* The recommendation for formal discipline shall be concurred in by a majority of all members of the Commission and may include one or more of the following: (1) A recommendation to the Supreme Court that the judge be removed from office; (2) A recommendation to the Supreme Court that the judge be suspended, with or without pay; (3) Upon a finding of physical or mental disability, a recommendation to the Supreme Court that the judge be granted leave with pay; (4) Upon a finding of physical or mental disability, a recommendation to the Supreme Court that the judge be retired and considered eligible for his/her retirement benefits, pursuant to Ark. Code Ann. § 24-8-217 (1987); (5) Reprimand or censure.

K. *Dissent.* If a member or members of the Commission dissent from a recommendation as to discipline, a minority recommendation shall be transmitted with the majority recommendation to the Supreme Court.

L. *Opinion to be Filed.* The final decision in any case which has been the subject of a formal disciplinary hearing shall be in writing and shall be filed with the clerk of the Arkansas Supreme Court, along with any dissenting or concurring opinion by any Commission member. The opinion or opinions in any case must be filed within seven (7) days of rendition.

M. *Witness Fees.* All witnesses shall receive fees and expenses in the amount allowed by rule or statute for witnesses in civil cases. Expenses of witnesses shall be borne by the party calling them. (Amended May 14, 1990; amended March 13, 2008.)

Discipline and Disability Commission.

CASE NOTES

Cited: In re Switzer, 303 Ark. 288, 796 S.W.2d 341 (1990); Griffen v. Ark. Judicial Discipline & Disability Comm'n, 266 F. Supp. 2d 898 (E.D. Ark. 2003); Ark. Judicial Disci-

pline & Disability Comm'n v. Simes, 2011 Ark. 193, — S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).

Rule 10. Interim sanctions.

A. Suspension with Pay. In instances of the (1) filing of an indictment or information charging a judge with a felony under state or federal law, or (2) the filing of a misdemeanor charge against a judge or justice where his ability to perform the duties of his office is adversely affected, the Commission shall convene within ten (10) days for the purpose of considering a recommendation to the Supreme Court that the judge or justice be temporarily suspended with pay pending the outcome of any disciplinary determination.

B. Effect on Commission Action. A temporary suspension with pay as an interim sanction shall not preclude action by the Commission with respect to the conduct that was the basis for the felony or misdemeanor charge, nor shall the disposition of the charge in any manner preclude such action. (Amended July 16, 1990.)

CASE NOTES

ANALYSIS

Due process.

Temporary suspension with pay.

Due Process.

Because circuit court judge could only be suspended with pay pending the outcome of criminal charges and any disciplinary determination, the judge suffered no due-process deprivation. In re Davis, 358 Ark. 351, 189 S.W.3d 444 (2004).

Temporary Suspension with Pay.

Where circuit court judge was arrested for driving while intoxicated, failure to register a

vehicle, and unlawful use of dealer tag, the Arkansas Supreme Court concurred with the recommendation of the Arkansas Judicial Discipline and Disability Commission that a temporary suspension with pay, pending the outcome of any disciplinary determination resulting from three criminal charges filed, was proper; the judge and others involved would likely have been called as witnesses in future proceedings and their credibility would have been an issue. In re Davis, 358 Ark. 351, 189 S.W.3d 444 (2004).

Cited: In re Switzer, 303 Ark. 288, 796 S.W.2d 341 (1990).

Rule 11. Ex parte communications.

Commission Members and Alternates shall not communicate ex parte with the Executive Director or the staff of the Commission, or the respondent judicial officer, his or her family, friends, representatives, or counsel regarding a pending or impending investigation or disciplinary matter except as explicitly provided for by law or Rules of the Commission, or for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits. A violation of this rule may be cause for removal of any member or Alternate from a panel before which a matter is pending. (Amended March 13, 2008.)

CASE NOTES

Cited: In re Switzer, 303 Ark. 288, 796 S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).
S.W.2d 341 (1990); Ark. Judicial Discipline & Disability Comm'n v. Simes, 2011 Ark. 193, —

Rule 12. Supreme Court review.

A. *Filing and Service.* The Executive Director of the Commission shall prepare the record consisting of the transcript of the proceedings, exhibits, and all pleadings, and the Chair of the Commission shall certify the record prepared by the Executive Director. The Commission shall file the record and the Commission's report, findings, and recommendations with the Supreme Court no later than 30 days after the filing made under Rule 9(L) and shall serve copies of its report, findings, and recommendations upon the judge. On application by the Commission, the court may direct the withholding of a recommendation regarding discipline pending the determination of other specified matters.

B. *Prompt Court Consideration.* The Clerk of the Supreme Court shall docket any Commission matter for expedited consideration.

C. *Objection and Appeal.* Within twenty days of service of the Commission's report, findings, and recommendations, the judge may appeal the findings and recommendations to the Supreme Court by filing a notice of appeal with the Clerk of the Supreme Court with a copy to the Executive Director of the Commission. The notice of appeal shall designate the findings and recommendations of the Commission from which appeal is sought. The appeal shall be processed in accord with the Rules of the Supreme Court and Court of Appeals for civil matters with the judge the appellant and the Commission the appellee. The judge shall file the appellant's brief with the Supreme Court within thirty days of the filing of the notice of appeal.

D. *Report not contested.* If the judge does not challenge or object to the Commission's report, finding, and recommendations, the Supreme Court shall review the record and Commission's report, findings, and recommendations and make a decision pursuant to subsection G of this rule. No briefs are filed.

E. *Supplementation.* If the court desires an expansion of the record or additional findings, either with respect to the recommendation for discipline or sanction to be imposed, it shall remand the case to the Commission for the appropriate directions, retaining jurisdiction, and shall withhold action pending receipt of the additional filing. The Supreme Court may order additional filings or oral argument as to the entire case or specified issues. The Supreme Court may accept or solicit supplementary filings with respect to medical or other information without remand and prior to an imposition of discipline provided that the parties have notice and an opportunity to be heard thereon.

F. *Scope of Discipline.* The Supreme Court, when considering removal of a judge, shall determine whether discipline as a lawyer also is warranted. If removal is deemed appropriate, the court shall notify the judge, the Commission and the Supreme Court Committee on Professional Conduct and give each an opportunity to be heard on the issue of the imposition of lawyer discipline.

G. *Decision*. Based upon a review of the entire record, the Supreme Court shall file a written opinion and judgment directing such disciplinary action as it finds just and proper. It may accept, reject, or modify in whole or in part, the findings and recommendation of the Commission. In the event that more than one recommendation for discipline for the judge is filed, the court may render a single decision or impose a single sanction with respect to all recommendations. The court may direct that no motion for rehearing will be entertained, in which event its decision shall be final upon filing. If the court does not so direct, the respondent may file a motion for rehearing within fifteen (15) days of the filing of the decision.

H. *Certiorari*. The Supreme Court may bring up for review any action taken upon any complaint filed with the Commission, and may also bring up for review a case in which the Commission has failed to act. (Amended February 3, 2011, effective March 1, 2011.)

CASE NOTES

ANALYSIS

Certiorari.

Petition for certiorari.

Record.

Scope of authority.

Certiorari.

The Commission would be the proper forum to bring evidence that the responding judge lied in his testimony before the commission but such evidence constitutes no basis for certiorari. *Hopper v. Arkansas Judicial Discipline & Disability Comm'n*, 304 Ark. 296, 800 S.W.2d 722 (1990).

Petition for Certiorari.

If the petition makes no allegation of an error on the face of the record, the petition for certiorari would be denied. *Duty v. Arkansas Judicial Discipline & Disability Comm'n*, 304 Ark. 294, 801 S.W.2d 46 (1990); *Hopper v. Arkansas Judicial Discipline & Disability Comm'n*, 304 Ark. 296, 800 S.W.2d 722 (1990).

Record.

In a disciplinary proceeding brought against a circuit court judge, the Arkansas Judicial Discipline and Disability Commission was directed to supplement the record because the Commission failed to file the entire record, as required by subdivision (E) of this rule; the record did not contain all

pleadings, documents, and evidence. *Ark. Judicial Discipline & Disability Comm'n v. Simes*, 2009 Ark. 391, 329 S.W.3d 275 (2009).

Scope of Authority.

The provision of subsection F of this rule has to do with reviewing the commission's actions in deciding the cases before it, and it is not indicative of a general supervisory power in the supreme court. *Commission on Judicial Discipline & Disability v. Digby*, 303 Ark. 24, 792 S.W.2d 594 (1990).

After the Arkansas Judicial Discipline and Disability Commission held a hearing and issued a Letter of Admonishment, the judge was required to appeal the matter to the Arkansas Supreme Court and the judge's action filed in the federal district court could not be heard because the federal district court did not have jurisdiction when the matter was one of state concern and the Arkansas Supreme Court should have been able to address the constitutional issues raised by the judge. *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 266 F. Supp. 2d 898 (E.D. Ark. 2003).

Cited: *Griffen v. Ark. Judicial Discipline & Disability Comm'n*, 355 Ark. 38, 130 S.W.3d 524 (2003); *Ark. Judicial Discipline & Disability Comm'n v. Simes*, 2011 Ark. 193, — S.W.3d —, 2011 Ark. LEXIS 186 (May 5, 2011).

Rule 13. Cases involving allegations of mental and physical disability.

A. *Procedure*. In considering allegations of mental and physical disability, the Commission shall, insofar as applicable and except as provided in Paragraph B., follow procedure established by these rules.

B. *Special Provisions*.

(1) If a complaint or statement of allegation involves the mental or physical health of a judge, a denial of the alleged disability or condition shall constitute a waiver of medical privilege and the judge shall be required to produce his medical records.

(2) In the event of a waiver of medical privilege, the judge shall be deemed to have consented to an examination by a qualified medical practitioner designated by the Commission.

(3) The Commission shall bear the costs of the proceedings, including the cost of a physical or mental examination ordered by it.

Rule 14. Involuntary retirement.

A judge who is advised to retire voluntarily and who refuses may be retired involuntarily by the Supreme Court following the filing of a formal complaint, a public hearing thereon before the Commission, and a report containing a finding that he is physically or mentally disabled, and recommendation to the court that such action be taken.

Rule 15. Complaints shall be adjudicated or dismissed within 18 months.

A sworn complaint shall be dismissed if not disposed of as provided in these Rules within 18 months from receipt of the complaint by the Commission. The following periods are excluded in computing the time for disposition:

A. All periods of delay granted at the request of the judge from and to a date certain.

B. All periods of suspension under Rule 10.

C. All periods of time in which the judge has concealed or conspired to conceal facts that would be evidence or could lead to evidence of any violation of the code of judicial conduct.

The dismissal of a complaint under this or any Rule of the Commission shall be an absolute bar to any subsequent filing of the complaint or any complaint that could have been joined with the complaint dismissed. (Added March 13, 2008.)

CASE NOTES

Cited: Ark. Judicial Discipline & Disability
Comm'n v. Simes, 2011 Ark. 193, — S.W.3d —,
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5. Distribution and publication of advisory opinions.
6. Binding effects of advisory opinions.

Rule 1. Judicial ethics advisory committee — Organization.

Pursuant to Section 5 of Act 791 of 1991 a Judicial Ethics Advisory Committee is hereby created to give advisory opinions to elected officials, judicial officers and candidates for judicial office seeking opinions concerning the compliance of an intended, future course of conduct with the Arkansas Code of Judicial Conduct. The Committee, appointed by the Judicial Discipline & Disability Commission, shall consist of no more than two retired justices or judges and one attorney who is a member of the Arkansas Bar and has never been a publicly elected judicial officer. Committee members may be reappointed and shall serve for three-year terms from date of appointment except that to achieve staggered terms, the first two appointed retired judges shall draw for which one shall serve for three years and which one shall serve for one year. The first appointed attorney shall serve for a two-year term. Vacancies on the committee for an unexpired term shall be filled for the remainder of the term. No member shall serve simultaneously on the Judicial Ethics Advisory Committee and the Judicial Discipline & Disability Commission. Members of the Committee shall be reimbursed their actual and necessary expenses incurred in the discharge of their official duties by the Judicial Discipline & Disability Commission. A chair shall be elected by the Committee members. The Committee may promulgate additional rules of procedure not inconsistent with these rules.

Rule 2. Eligibility for requesting advisory opinions and submissions.

A request for a judicial ethics advisory opinion shall be directed to the Executive Director of the Judicial Discipline & Disability Commission, who shall forward the request to the committee. Requests will be accepted only from elected officials, judicial officials (justices or judges) and publicly declared candidates for judicial office.

Publisher's Notes. The mailing address of the Executive Director of the Judicial Discipline & Disability Commission is 323 Center

Street, Suite 1060, Little Rock, Arkansas 72201.

Rule 3. Requests for advisory opinions — Contents.

Requests for judicial ethics advisory opinions shall relate to prospective conduct only and shall contain a complete statement of all facts pertaining to the intended conduct together with a clear, concise question of judicial

ethics. The identity of the individual, whose proposed conduct is the subject of the request, shall be disclosed to the Committee. The requesting individual shall include with the request a concise memorandum setting forth his or her own research and conclusions concerning the question and the statement that the matter is not the subject of a pending disciplinary proceeding. Requests shall not be accepted or referred for opinion unless accompanied by this memorandum.

Publisher's Notes. By memorandum dated March 2, 1995 the Judicial Ethics Advisory Committee has requested the Execu-

tive Director to assist in the enforcement of the last two sentences of this rule.

Rule 4. Scope of and procedure for issuance of advisory opinions.

Advisory opinions shall set forth the facts upon which the opinion is based. Advisory opinions shall address only whether an intended, future course of conduct violates the Arkansas Code of Judicial Conduct and shall provide an interpretation of this Code with regard to the factual situation presented. The opinion shall not address issues of law nor shall it address the ethical propriety of past or present conduct. The identity of the requesting person shall be disclosed in the opinion. If the individual facts and circumstances provided are insufficient in detail to enable the Committee to render an advisory opinion, the Committee shall request supplementary information from the requesting individual to enable it to render such opinion. If such supplementary information is still insufficient or is not provided, the Committee shall so state and shall not render an advisory opinion based upon what it considers to be insufficient detail. The Committee may respond to requests for an advisory opinion by referring the requesting individual to a prior opinion and by so doing need not publish a new advisory opinion. Two members of the Committee shall constitute a quorum for the transaction of any Committee business, including the issuance of any advisory opinion, whether in a meeting or by conference call or by circulated writing.

Rule 5. Distribution and publication of advisory opinions.

The Executive Director of the Judicial Discipline & Disability Commission shall provide a copy of each advisory opinion to the requesting party, the Chief Justice of the Supreme Court, the Judicial Discipline & Disability Commission, the Supreme Court library, the two law school libraries and the American Judicature Society. The Executive Director of the Judicial Discipline & Disability Commission shall keep the original opinion in a permanent file. Copies of the opinions will also be published in a publication generally available to judicial officials such as the Supreme Court advance sheets.

Rule 6. Binding effects of advisory opinions.

All opinions shall be advisory in nature only. No opinion shall be binding on the Judicial Discipline & Disability Commission or the Supreme Court in the exercise of their judicial discipline responsibilities. However, compliance by the requesting individual with a written advisory opinion of the Committee is evidence of a good faith effort to comply with the Arkansas Code of Judicial Conduct. An opinion given to a requesting individual in an oral

conversation is not binding on the Committee nor evidence of a good faith effort to comply with the Arkansas Code of Judicial Conduct.

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RULE PROVIDING FOR CERTIFICATION OF COURT REPORTERS

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RESEARCH REFERENCES

Ark. L. Notes. Watkins, Recent Amendments to the Arkansas Rules of Civil and Appellate Procedure, 1988 Ark. L. Notes 47.

Section 1. Members of the board.

A. The Board of Certified Court Reporters Examiners hereafter referred to as the "Board", shall be composed of seven members who shall be appointed by this Court. Four of the members shall be judges of the Circuit or Appellate Courts and shall be appointed for terms of three years. Initially, one of the four shall be appointed for a term of one year, one for a term of two years, and two for a term of three years. Three of the Board members shall have been court reporters in and citizens of Arkansas for at least five years prior to their appointment. Of the court reporters appointed to the board, at least one shall be a machine shorthand writer, at least one shall be a mask dictation/voice writer, at least one shall be an official court reporter, and at least one shall be a freelance court reporter. Initially, one of the three shall be appointed for a term of one year, one for a term of two years, and one for a term of three years. Members of the Board shall serve without compensation but shall be reimbursed for their travel and other expenses in the performance of their duties.

B. Members shall be appointed to serve a three year term and may be reappointed to a second three year term. A member whose term has expired

shall continue to serve until a successor is appointed and qualified. The Court shall fill any vacancy by appointing a member for the duration of an unexpired term and may remove any member for cause. A member who has been appointed to complete an unexpired term shall be eligible for reappointment to serve two terms of three years each.

C. Each member shall take an oath that he will fairly and impartially and to the best of his ability administer this Rule. (Adopted July 5, 1983, effective February 1, 1984; amended June 17, 1999; amended October 30, 2003.)

Section 2. Officers of the board; meetings.

A. At the first meeting of the Board, the Board will organize by electing one of its members as chairman and one as secretary, each of whom shall serve for one year and until his successor is elected. The Clerk of this Court shall serve as treasurer.

B. The Board shall meet at least twice a year at such times and places as the Board shall designate. (Adopted July 5, 1983, effective February 1, 1984; amended January 15, 2009.)

Section 3. Duties of the board.

The Board is charged with the duty and invested with the power and authority:

A. To determine the eligibility of applicants for certification.

B. To determine the content of examinations to be given to applicants for certification as certified court reporters.

C. To determine the applicant's ability to make a verbatim record of court proceedings by any recognized system designated by the Board.

D. To issue certificates to those found qualified as certified court reporters.

E. To set a fee to be paid by each applicant at the time the application is filed and an annual license fee.

F. To develop a records retention schedule for official court reporters of state trial courts.

G. To develop, implement, and enforce a continuing education requirement for court reporters certified pursuant to this Rule.

H. To promulgate, amend and revise regulations relevant to the above duties and to implement this Rule. Such regulations are to be consistent with the provisions of this Rule and shall not be effective until approved by this Court.

I. To provide a system and procedure for receiving complaints against court reporters, investigating such complaints, filing formal disciplinary Complaints against reporters, and for hearing, consideration, and determination of validity of charges and appropriate sanctions to be imposed upon any reporter. (Adopted July 5, 1983, effective February 1, 1984; amended October 16, 1995; amended April 8, 1999; amended January 15, 2009.)

Section 4. Application for certification.

Every applicant for examination for certification as a certified court reporter shall file with the clerk of this court a written application in the form prescribed by the Board. Upon request, the clerk of this court shall

forward to any interested person application forms together with the text of this rule and a copy of the regulations promulgated by the Board under the provisions of Rule 3E. (Adopted July 5, 1983, effective February 1, 1984; amended January 15, 2009.)

Section 5. Eligibility for certification.

Applicants shall:

- a. be at least 18 years of age,
- b. be of good moral character,
- c. not be a convicted felon, and
- d. not have been adjudicated or found guilty, or entered a plea of guilty or nolo contendere to, any felony, or to any misdemeanor that reflects adversely on the applicant's honesty, trustworthiness, or fitness as a reporter in other respects, or to any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a felony. (Adopted July 5, 1983, effective February 1, 1984; amended January 15, 2009.)

Section 6. Admission without examination.

Upon application and payment of the fee within four months of the effective date of the rule, any court reporter serving in that capacity on or before July 5, 1983, shall be issued a certificate without examination, provided the application and fee are accompanied by letters of recommendation from either a Circuit, Chancery, or Court of Appeals Judge and two attorneys who are licensed to practice law in the State of Arkansas, who certify that the applicant was a practicing court reporter on or before July 5, 1983. (Adopted July 5, 1983, effective February 1, 1984; amended November 14, 1983.)

Publisher's Notes. Section 12 of this Rule provided that the effective date of this Rule is February 1, 1984.

Section 7. Discipline.

(a) **Sanctions.** For violating any of the provisions of Sections 19 or 22 of the "Regulations of the Board of Certified Court Reporter Examiners," the Board for good cause shown, and by a majority of four (4) votes from the Board concurring, after a public hearing by the Board, may sanction a reporter by ordering a public admonition, or by suspending or revoking any certificate issued by the Board. The Board, with four (4) votes concurring, may sanction a reporter for minor or lesser misconduct with a private, non-public admonition by discipline by consent, as set out in Section 8 of these Rules.

(b) **Definitions.**

1. "Revoke a certificate" means to unconditionally prohibit the conduct authorized by the certificate. If a reporter's certificate is revoked, the reporter is not eligible to apply for a new reporter's certificate for a period of

five (5) years after the date the revocation order becomes effective after final Board action or after final action by the Supreme Court of Arkansas, if there is an appeal.

2. "Suspend a certificate" means to prohibit, whether absolutely or subject to conditions which are reasonably related to the grounds for suspension, for a defined period of time, the conduct authorized by the certificate. No suspension shall be for less than one (1) month nor for more than sixty (60) months.

3. "Admonition" means a written order or opinion of the Board stating the specific misconduct or failure to perform duties by the reporter. The admonition shall be designated as being private or public by the Board. A private admonition shall be a confidential document known and available only to the Board and the reporter.

4. "Special Prosecutor" refers to an individual, who is charged with the duties of investigating complaints presented to the Board, which pertain to alleged violations of the Rules and Regulations; drafting proposed Complaints for the Board's review, which outline the alleged violations of the Rules and Regulations; serving as a prosecutorial officer before and during any hearing or proceeding, which result from the investigation and/or filing of the Complaint; and performing additional tasks as assigned by the Board.

(c) **Subpoenas.** The Board has the authority to issue subpoenas for any witness(es), and for the production of papers, books, accounts, documents, records, or other evidence and testimony relevant to a hearing held pursuant to Section 7 upon the request of any party. Such process shall be issued by and under the seal of the Board and be signed by the Chair or the Executive Secretary. The subpoenas shall be served in any manner provided by the Arkansas Rules of Civil Procedure for service of process. The Board shall provide for its use a seal of such design as it may deem appropriate. The Circuit Court of Pulaski County shall have the power to enforce process.

(d) **Special Prosecutor.**

(1) When requested in writing by the Board to so serve, the Executive Director of the Arkansas Supreme Court Office of Professional Conduct ("Office") may, if time, work demands, and resources of that Office permit, act as the investigating, charging, and prosecutorial officer for Complaints of this Board. Any expenses of that Office attributed to handling a Complaint from this Board shall be paid to the Bar of Arkansas account from funds available to this Board after review and approval by the Chair of this Board of any such expense claims. By agreement between this Board and the Office, reasonable reimbursement for attorney time may be made by the Board to the Office.

(2) The Board may employ on contract, from funds within its budget, such attorneys as it deems necessary for the investigation, charging, and prosecution of Complaints before the Board.

(e) **Immunity.** The Board, its individual members, and any employees and agents of the Board, including the Executive Director and staff of the Office of Professional Conduct when acting for the Board, are absolutely immune from suit or action for their activities in discharge of their duties hereunder to the full extent of judicial immunity in Arkansas.

(f) **Confidentiality.** Subject to the exceptions listed in (4) below in this subsection:

(1) All communications, Complaints, formal Complaints, testimony, and evidence filed with, given to or given before the Board, or filed with or given

to any of its employees and agents during the performance of their duties, that are based upon a Complaint charging a reporter with violation of the Board Rules, shall be absolutely privileged and confidential; and

(2) All actions and activities arising from or in connection with an alleged violation of the Board Rules by a reporter certified by the Board are absolutely privileged and confidential.

(3) These provisions of privilege and confidentiality shall apply to complainants.

(4) Exceptions.

(i.) Except as expressly provided in these Rules, disciplinary proceedings under these Rules are not subject to the Arkansas Rules of Civil Procedure regarding discovery.

(ii.) The records of public hearings conducted by the Board are public information.

(iii.) In the case of revocation, the Board is authorized to release any information that it deems necessary for that purpose.

(iv.) The Board is authorized to release information:

(a) For statistical data purposes;

(b) To a corresponding reporter disciplinary authority or an authorized agency or body of a foreign jurisdiction engaged in the regulation of reporters;

(c) To the Commission on Judicial Discipline and Disability;

(d) To any other committee, commission, agency or body within the State empowered to investigate, regulate, or adjudicate matters incident to the legal profession when such information will assist in the performance of those duties; and

(e) To any agency, body, or office of the federal government or this State charged with responsibility for investigation and evaluation of a reporter's qualifications for appointment to a governmental position of trust and responsibility.

(5) Any reporter against whom a formal Complaint is pending shall have disclosure of all information in the possession of the Board and its agents concerning that Complaint, including any record of prior Complaints about that reporter, but excepting "attorney work product" materials.

(6) The reporter about whom a Complaint is made may waive, in writing, the confidentiality of the information.

(g) **Procedure.**

1. Standard of Proof. Formal charges of misconduct, petitions for reinstatement, and petitions for transfer to or from inactive status shall be established by a preponderance of the evidence.

2. Burden of Proof. The burden of proof in proceedings seeking discipline is on the Board or its special prosecutor. The burden of proof in proceedings seeking reinstatement is on the reporter seeking such action.

3. Limitations on Actions. The institution of disciplinary actions pursuant to these Procedures shall be exempt from all statutes of limitation.

4. Evidence and Procedures. Except as noted in these Rules, the Arkansas Rules of Evidence and the Arkansas Rules of Civil Procedure shall not generally apply to discipline proceedings before the Board.

5. Pleadings. All pleadings filed before the Board shall be captioned "Before the Supreme Court Board of Certified Court Reporter Examiners" and be styled "In re _____" to reflect the name of the respondent reporter.

(h) **Ex Parte Communication.**

(1) Members of the Board shall not communicate “ex parte” with any complainant, attorney acting as Board prosecutor, the Executive Director, or the staff of the Office of Professional Conduct, or the respondent reporter or his or her counsel regarding a pending or impending investigation or disciplinary matter except as explicitly provided for by law or these Rules, or for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits of the case or Complaint.

(2) A violation of this rule may be cause for removal of any member from the Board before which a matter is pending.

(i) **Probable cause determination.** Before a formal Complaint may be prepared on any reporter, the written approval of four (4) members of the Board shall be given to the complaint as filed. Before any formal Complaint may be served on a reporter, it shall be approved by the signature of the Board Chair.

(j) **Complaint.** The Complaint to be served upon a reporter shall state with reasonable specificity each Board Rule alleged to have been violated by the reporter and summarize the conduct or omission by the reporter that supports the Rule violation. Affidavits of those persons having knowledge of the facts and court records and documents may be attached as exhibits to the Complaint.

(k) **Service of Complaint.** The Complaint shall be served by one of the following methods:

1. By certified, restricted delivery, return receipt mail to the reporter at the address of record for the reporter currently on file with the Board,

2. By personal service as provided by the Arkansas Rules of Civil Procedure or an Investigator with the Office of Professional Conduct; or,

3. When reasonable attempts to accomplish service by (k)(1) and (k)(2) have been unsuccessful, then a warning order, in such form as prescribed by the Board, shall be published weekly for two consecutive weeks in a newspaper of general circulation within this State or within the locale of the respondent reporter’s address of record. In addition, a copy of the formal Complaint and warning order shall be sent to the respondent reporter’s address of record by regular mail.

4. A reporter’s failure to provide an accurate, current mailing address to the Board or the failure or refusal to receipt certified mailing of a formal Complaint, shall be deemed a waiver of confidentiality for the purposes of the issuance of a warning order.

5. Unless good cause is shown for a reporter’s non-receipt of a certified mailing of a formal Complaint, the reporter shall be liable for the actual costs and expenses for service or the attempted service of a formal Complaint, to include all expenses associated with the effectuation of service. Such sums will be due and payable to the Board before any response to a formal Complaint will be accepted or considered by the Board.

6. After service has been effected by any of the aforementioned means, subsequent mailings by the Board to the respondent reporter may be by regular mail to the reporter’s address of record, to the address at which service was accomplished, to any counsel for the reporter, or to such address as may have been furnished by the reporter, as the appropriate circumstance may dictate, except that notices of hearings and letters or orders of

admonition, suspension, or revocation shall also be sent by certified, return receipt mail or be served upon the reporter in a manner authorized in Section 7(k)(2).

7. Service on a non-resident reporter may be accomplished pursuant to any option available herein, or in any manner prescribed by the law of the jurisdiction to which the service is directed.

(1) Time and Manner of Response; Rebuttal.

(1) Upon service of a formal Complaint, pursuant to Section 7(k) or after the date of the first publication, pursuant to Section 7(k)(3), the respondent reporter shall have twenty (20) days in which to file a written response in affidavit form with the Board of Certified Court Reporters Examiners by filing the response at the Office of the Clerk of the Arkansas Supreme Court, 625 Marshall Street, Little Rock, AR 72201, except when service is upon a non-resident of this State, in which event the respondent reporter shall have thirty (30) days within which to file a response. In the event that a response has not been filed with the Board of Certified Court Reporters Examiners within twenty (20) days or within thirty (30) days, as the appropriate case may be, following the date of service, and an extension of time has not been granted, the Executive Secretary shall proceed to issue the Complaint to the Board by mail as a "failed to respond" case.

(2) At the written request of a reporter, the Board Chair is authorized to grant an extension of reasonable length for the filing of a response.

(3) The Executive Secretary shall provide a copy of the reporter's response to the complainant within seven (7) calendar days of receiving it and advise that the complainant has ten (10) calendar days in which to rebut or refute any allegations or information contained in the reporter's response. The Executive Secretary shall include any rebuttal made by the complainant as a part of the material submitted to the Board for decision and any such rebuttal shall be provided to the respondent reporter for informational purposes only, with no response required. If any rebuttal submitted contains allegations of violations of Board Rules not previously alleged, a supplemental or amended Complaint may be prepared and served on the respondent reporter, who shall be permitted surrebuttal in the manner prescribed herein for filing a response to a Complaint.

(4) The calculation of the time limitations specified herein shall commence on the day following service upon the respondent reporter. If the due date of a response, rebuttal, or surrebuttal falls on a Saturday, Sunday, or legal holiday, the due date will be extended to the next regular business day.

(m) Failure to Respond; Reconsideration.

(1) A reporter's failure to provide, in the prescribed time and manner, a written response to a formal Complaint served in compliance with Section 7(k) shall constitute separate and distinct grounds for the imposition of sanctions notwithstanding the merits of the underlying, substantive allegations of the Complaint; or,

(2) May be considered for enhancement of sanctions imposed upon a finding of violation of the Rules.

(3) The separate imposition or the enhancement of sanctions for failure to respond may be accomplished by the Board's notation of such failure in the appropriate sanction order and shall not require any separate or additional notice to the respondent reporter.

(4) Failure to timely respond to a formal Complaint shall constitute an admission of all factual allegations of the Complaint and an admission of all alleged violations of Rules and Regulations in the Complaint.

(5) Failure to timely respond to a formal Complaint shall extinguish a respondent reporter's right to a public hearing on the formal Complaint.

(6) **Reconsideration:**

(a) Provided, however, that in a case where a timely response was not filed by a respondent reporter, within ten (10) calendar days after receiving a written notice from the Board setting the case for hearing, the respondent reporter may file with the Board, through the Office of the Clerk of the Arkansas Supreme Court, a petition for reconsideration in affidavit form, stating under oath clear, compelling, and cogent evidence of unavoidable circumstances sufficient to excuse or justify the failure to file a timely response to the Complaint.

(b) Upon the filing of a petition for reconsideration for failure to timely file a response to a Complaint, the Executive Secretary of the Board shall provide each member of the Board a copy of the petition for reconsideration for a vote by written ballot on granting or denying the petition, the ballot to be marked and returned to the Executive Secretary within a reasonable time.

(c) If four (4) members of the Board, upon a finding of clear and convincing evidence, vote to grant the petition for reconsideration, the Board shall permit the reporter to submit a belated affidavit of response to the substantive allegations of the formal Complaint and the matter shall proceed as though the response had been made timely.

(d) If four (4) Board members vote to deny the petition for reconsideration, the case shall be placed on the agenda at the next meeting of the Board, and the Board shall determine the appropriate sanction from a review of the file, without giving consideration or weight to any response that may have been untimely filed.

(n) **Pretrial procedure.**

(1) The Board Chair may set and conduct such pretrial conferences as the Chair deems needed for the case. The Board Chair shall also issue an order setting any Complaint for hearing before the Board.

(2) The Board Chair shall hear and decide all pretrial matters and all motions, including any motion to dismiss the Complaint or any part thereof.

(o) **Hearings.**

(1) Hearings shall be conducted at such times and places as the Board may designate.

(2) A hearing shall not be conducted unless at least five (5) Board members are present.

(3) After hearing all the testimony and receiving all the evidence in a case, the Board shall deliberate in private and reach a decision on the Complaint. At least four (4) votes are required to find a Rule or Regulation violation and to order a sanction. The same four (4) Board members are not required to vote for both the rule violation(s) and the sanction.

(4) If at least four (4) Board members agree on the Rule or Regulation violated by the reporter, and on a sanction, an Order consistent with such vote shall be prepared and provided to the Board Chair for review and approval. Upon approval, such Order shall be filed with the Clerk of the Arkansas Supreme Court and a filed copy shall be promptly provided to the respondent reporter and any counsel for the reporter.

(5) In addition to any available disciplinary sanction, the Board may also order a reporter to pay:

(a) The costs of the investigation and hearing, excluding any attorney's fees,

(b) A fine not to exceed \$1,000.00 and

(c) Full restitution to any person or entity which has suffered a financial loss due to the reporter's violation of any Board Rule or Regulation, but only to the extent of the costs of any reporter's transcript and fees and expenses associated with a transcript of any court proceeding or deposition.

(6) Once a public hearing has commenced, a private, confidential admonition is not an available sanction. (Adopted July 5, 1983, effective February 1, 1984; amended April 13, 1992; amended May 3, 1993; amended October 30, 2003; amended February 21, 2008; amended January 15, 2009.)

Section 8. Surrender of certificate — Discipline by consent.

(a) **Surrender of Certificate.** A reporter may surrender his or her certificate upon the conditions agreed to by the reporter and the Board:

(1) In lieu of disciplinary proceedings where serious misconduct by the reporter is admitted by the reporter to exist, or

(2) On a voluntary surrender basis of his or her certificate at any time where there is no pending Complaint against the reporter.

(3) No petition to the Supreme Court for voluntary surrender of a certificate by a reporter shall be granted until referred to and approved by the Board and the recommendations of the Board are received by the Supreme Court.

(4) If the Supreme Court accepts any form of surrender of a reporter's certificate, it will do so by per curiam order.

(b) **Discipline by Consent.**

(1) A reporter against whom a formal Complaint has been served may, at any stage of the proceedings not less than ten (10) business days prior to the commencement of a public hearing tender a written conditional acknowledgment and admission of violation of some or all of the Rules and Regulations alleged, in exchange for a stated disciplinary sanction in accordance with the following:

(2) With service of a Complaint, the respondent reporter shall be advised in writing that if a negotiated disposition by consent is contemplated that the respondent reporter should contact the Board Chair or the Board's special prosecutor to undertake good faith discussion of a proposed disposition. All discipline by consent proposals must be approved in writing by the Board Chair, or by the Board's special prosecutor before the consent proposal can be submitted to the Board.

(3) Upon a proposed disposition acceptable to the respondent reporter and the Board Chair or representative, the respondent reporter shall execute and submit a consent proposal on a document prepared by the Board setting out the necessary factual circumstances, admissions of violation of the Board Rules and Regulations, and the terms of the proposed sanction.

(4) The consent proposal, along with copies of the formal Complaint, and the recommendations of the Board Chair or representative, shall be presented to the Board by written ballot to either accept or reject the proposed

disposition. The respondent reporter will be notified immediately in writing of the Board's decision. Rejection will result in the continuation of the formal Complaint process.

(5) No appeal is available from a disciplinary sanction entered by the consent process.

(6) The Board shall file written evidence of the terms of any public sanction discipline by consent, in the form of an order, with the Clerk of the Supreme Court.

(c) **Serious Misconduct.** If the discipline by consent involves allegations of serious misconduct, for which a suspension or revocation of the certificate is to be imposed, the Supreme Court shall also approve any agreed consent proposal and any sanction.

(1) The Board shall present to the Supreme Court, under such procedures as the Supreme Court may direct, any discipline by consent proposal involving serious misconduct, which the Board has reached with a respondent reporter.

(2) If the Supreme Court does not approve the proposed discipline by consent or the voluntary surrender of the certificate, the matter shall be referred back to the Board which shall resume the proceedings at the stage at which they were suspended when the consent proposal was made and submitted to the Supreme Court. (Adopted January 15, 2009.)

Section 9. Appeal.

(a) Within thirty (30) days of receipt of written findings of the Board issuing an admonition, or suspending or revoking a certificate, the aggrieved court reporter may appeal said findings to the Supreme Court of Arkansas for review de novo upon the record. Such appeal shall be prosecuted by filing a written notice of appeal with the Clerk of the Supreme Court of Arkansas with a copy thereof to the Chair of the Board. The notice of appeal shall specify the party taking the appeal; shall designate the order of the Board from which appeal is sought; and, shall designate the contents of the record on appeal. The notice shall also contain a statement that the transcript, or specific portions thereof, have been requested.

(b) The Executive Secretary of the Board shall prepare the record for appeal consisting of the pleadings, orders, and other documents of the case, and include therein the transcript of proceedings that is provided by the respondent reporter. The Chair of the Board shall certify the record prepared by the Executive Secretary.

(c) The respondent reporter shall be responsible for obtaining the transcript of any case proceedings and hearings and for timely providing same to the Executive Secretary of the Board. It shall be the responsibility of the appellant to transmit such record to the Supreme Court Clerk. The record on appeal shall be filed with the Supreme Court Clerk within ninety (90) days from filing of the first notice of appeal, unless the time is extended by timely filed order of the Board. In no event shall the time be extended more than seven (7) months from the date of entry of the initial order of the Board. Such appeals shall be processed in accord with pertinent portions of the Rules of the Supreme Court and Court of Appeals of the State of Arkansas. (Adopted January 15, 2009.)

Section 10. Funds — Disbursement of.

All fees and other monies accruing under the Rule shall be deposited by the Clerk of this Court in an account called, "Certified Court Reporters Fund." All expenses incurred by the Board shall be paid out of this fund as authorized and directed by the Board. Travel and other necessary expenses of the members of the Board shall be paid from said fund. (Adopted July 5, 1983, effective February 1, 1984; amended January 15, 2009.)

Section 11. Scope.

(a) After the effective date of this Rule, all transcripts taken in court proceedings, depositions, or before any grand jury will be accepted only if they are certified by a court reporter who holds a valid certificate under this Rule. Provided, however, that depositions taken outside this state for use in this state are acceptable if they comply with the Arkansas Rules of Civil Procedure.

(b) *Disciplinary Authority.* An Arkansas certified court reporter is subject to the disciplinary authority of this jurisdiction, regardless of where the court reporter's conduct occurs. A court reporter not certified in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the court reporter provides or offers to provide any court reporter services in this jurisdiction. A court reporter may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct. (Adopted July 5, 1983, effective February 1, 1984; amended March 5, 1984; amended March 14, 1988; amended February 21, 2008; amended January 15, 2009.)

Publisher's Notes. Section 12 of this Rule provided that the effective date of this Rule is February 1, 1984.

CASE NOTES

ANALYSIS

Certificate required.

Uncertified court reporter.

Certificate Required.

Transcripts cannot be accepted by the Supreme Court as evidence unless the court reporter has a valid temporary certificate or emergency certificate. *Pullan v. Fulbright*, 285 Ark. 152, 685 S.W.2d 151 (1985).

Uncertified Court Reporter.

Where the trial was recorded by an uncertified court reporter, appointed by the trial

judge to fill in for the certified court reporter who was ill, the trial judge was to direct and supervise the preparation of the trial transcript made from the recording made by the uncertified court reporter, if verified by affidavits from attorneys for both parties and the trial judge. *Moore v. State*, 290 Ark. 71, 716 S.W.2d 764 (1986).

Section 12. Effective date.

The effective date of this Rule is February 1, 1984. (Adopted July 5, 1983, effective February 1, 1984; amended December 19, 1983; amended January 15, 2009.)

Section 13. Continuing education requirement.

Reporters certified pursuant to this rule must acquire thirty (30) continuing education credits every three years through activities approved by the Board or a committee of the Board. Such three year period shall be known as the "reporting period." Each reporting period shall begin on January 1 and extend through December 31 three years hence. The reporting period for reporters newly certified pursuant to this Rule shall begin January 1 following certification by the Board. If a reporter acquires, during such reporting period, approved continuing education in excess of (30) thirty hours, the excess credit may be carried forward and applied to the education requirement for the succeeding reporting period only. The maximum number of continuing education hours one may carry forward is ten (10).

A continuing education credit is presumed to be 60 minutes in length. However, the Board in its discretion may grant greater or lesser credits per hour of education as each individual program may warrant. Court reporters certified pursuant to this rule who maintain a residence address outside the State of Arkansas are subject to this requirement. However, continuing education activities approved by the appropriate authority in their resident jurisdiction shall be applicable to this requirement.

To establish compliance with this continuing education requirement the Board may accept continuing education hours acquired to meet the continuing education requirements of the National Court Reporters Association or the National Verbatim Reporters Association.

Exceptions to Requirement.

In cases where extreme hardship or extenuating circumstances are shown, the Board may grant a waiver of the continuing education requirement or extensions of time within which to fulfill the requirements. Such waivers or extensions shall be considered only upon written request from the certificate holder. As a condition of any waiver or extension, the Board may set such terms and conditions as may be appropriate under the circumstances.

Any reporter certified pursuant to this rule who attains age 65 or 30 years of certification, during any reporting period, is exempt from all requirements of this rule for that reporting period as well as all subsequent reporting periods.

At any time during a reporting period a reporter may take inactive status as it pertains to the continuing education requirement of this rule. Inactive status means that a reporter will not practice court reporting until such time as the reporter returns to active status. Election of inactive status must be in writing. Election of inactive status must be annually renewed and the Board shall provide a form for renewal of inactive status. Such annual renewal shall be filed with the Board on or before March 31 of each year subsequent to the year of election of inactive status. For the purpose of this paragraph court reporting means "verbatim reporting" as defined in Section 1 of the "Regulations of the Board of Certified Court Reporter Examiners" and, verbatim reporting regardless of the context, including administrative or regulatory proceedings and non-judicial proceedings. A reporter may return to active status at any time upon written notice to the Board. In such case the reporter shall be subject to the thirty hour requirement of this rule for the reporting period beginning the following January 1.

Continuing Education Activities Content.

Continuing education credit may be obtained by attending or participating in Board approved seminars, conventions, or workshops, or other activities approved by the Board. To be approved for continuing education credit the activity must: be presented by individuals who have the necessary experience or academic skills to present the activity; include quality written materials; and, the course must be subject to evaluation. The continuing education activity must contribute directly to the competence and professionalism of court reporters. The Board is authorized to approve continuing education activities which include but are not limited to the following subject areas: language; academic knowledge; statutes and regulations; reporting technology and business practice; and, ethical practices-professionalism.

Administrative Procedures.

The Board shall be the authority for approval of continuing education programs. Such authority may be delegated by the Board to a committee. It is presumed that program approval will be sought and determined well in advance of the educational activity. However, the Board or its committee may approve an educational activity after the event.

The Board is authorized to develop appropriate forms and other administrative procedures as necessary to efficiently administer this continuing education requirement.

The Board shall require that reporters certified pursuant to this rule maintain and provide such records as necessary to establish compliance with this continuing education requirement. The Board may also require that sponsors provide evidence of attendance at programs in such form as the Board may direct.

On or before January 31 after the conclusion of the immediately preceding reporting period, the Board shall provide a final report by first class mail to reporters whose reporting period concluded the preceding December 31. The number of continuing education credits stated on the final report shall be presumed correct unless the reporter notifies the Board otherwise. In the event the final report shows that the reporter has failed to acquire 30 continuing education credits for the applicable reporting period, the reporter shall be in noncompliance with the requirements of this rule.

In the event of noncompliance, the certificate of the affected reporter shall be subject to suspension as set forth in the following section. Prior to initiation of suspension proceedings, the Board shall provide notice to allow the reporter to achieve compliance. Board approved continuing education credits obtained subsequent to the relevant reporting period and prior to a vote of suspension shall be accepted in order to cure noncompliance. However, such hours will be subject to a late filing fee in an amount not to exceed \$100.00.

Suspension of License — Reinstatement.

Section 7 of this rule — Discipline and Section 19 of the “Regulations of the Board of Certified Court Reporter Examiners” shall govern suspension or revocation proceedings for failure to comply with the continuing education requirements set out in Section 13 of this rule.

After a Board vote of suspension or revocation of a certificate, the Board shall notify the affected reporter by way of certified mail, restricted delivery,

return receipt requested. In addition, the Board shall file the order of suspension with the Clerk of this Court and provide such other notice as the Board may consider appropriate.

A reporter whose certificate has been suspended pursuant to this Section who desires reinstatement shall file a petition for reinstatement with the Board. The petition shall be properly acknowledged by a notary public or an official authorized to take oaths. It shall be in such form as the Board may direct. The petitioner may request a hearing before the Board. Upon appropriate notice and hearing, the Board may take action on the petition for reinstatement. In the event the certificate is reinstated, the Board may set additional educational requirements, including successful completion of a certification examination, as a condition of reinstatement and may assess reinstatement fees in an amount not to exceed \$250.00. (Adopted April 8, 1999, effective January 1, 2000; amended March 16, 2006; amended January 15, 2009.)

Publisher's Notes. By per curiam order of April 8, 1999, the Arkansas Supreme Court adopted a mandatory continuing education requirement for certified court reporters and appointed the Director of the Office of Professional Programs as administrator. The Board of Certified Court Reporter Examiners and the Director propose that the reporters be divided into three groups in order to ease implementation and future administration of the program. The Board and the Director also propose that programs given from July 1, 1999, through December 31, 1999, be subject to recognition for continuing education credit. Accordingly, the Arkansas Supreme Court adopted the following mandate, effective June 17, 1999:

Reporters whose last names begin with the letters A-G will have 10 hours due from January 1, 2000, through December 31, 2000; reporters whose last names begin with the

letters H-N will have 20 hours due from January 1, 2000, through December 31, 2001; and, reporters whose last names begin with the letters O-Z will have 30 hours due from January 1, 2000, through December 31, 2002. The Board is authorized to adjust the initial reporting deadlines for individual court reporters, during the implementation phase only, to avoid manifest injustice such as a substantial discrepancy between the State deadline and a national court reporter organization continuing education deadline. After the implementation period, each group of reporters will be subject to the thirty (30) hour requirement every three years, which will begin at the end of their respective initial reporting periods. Further, the Board, or an accreditation committee appointed by the Board, may approve continuing education hours acquired between July 1, 1999, and December 31, 1999.

REGULATIONS OF THE BOARD OF CERTIFIED COURT REPORTER EXAMINERS

Regulations: The Per Curiam Order of the Supreme Court of Arkansas dated July 1, 1991 provided:

"By per curiam order dated July 5, 1983, this Court established the Arkansas Supreme Court Board of Certified Court Reporter Examiners and directed that they promulgate relevant regulations for approval by this court.

"On September 26, 1983, this Court approved regulations submitted by the Board of Certified Court Reporter Examiners. Amend-

ments were approved by per curiam orders dated March 5, 1984, February 24, 1986, and June 16, 1986.

"On June 5, 1991, the Board filed a Motion to once again amend certain regulations. Pursuant to Section 3G. of the Rule Providing for Certification of Court Reporters, the Court approves and adopts those amendments as recommended effective this date.

"The Court hereby republishes the Regulations in their entirety as amended."

Section 1.

The following definitions are set forth: The word "Section" refers to sections of the per curiam of July 5, 1983. "Board" hereinafter referred to, is

the Certified Court Reporter Examiners Board. “Certified Court Reporter”, or its abbreviations, “CCR”, means any person holding a valid regular or temporary certificate in one of the methods approved herein as a certified verbatim reporter. The Certificate shall reflect the method of certification according to the system tested. (Amended July 1, 1991). “Verbatim Reporting” means the making of a verbatim record of court proceedings, depositions, or proceedings before any grand jury by means of manual or machine shorthand or mask dictation. As authorized by Administrative Order No. 4(e), an audio recording made pursuant to the requirements of Administrative Order No. 4 shall constitute a verbatim record. (Amended March 5, 1984; amended February 9, 2011, effective July 1, 2011).

Section 2.

Any court reporter serving in that capacity on or before January 1, 1983, may be issued a certificate as a Certified Court Reporter without examination provided the application is made prior to May 1, 1984, and is accompanied by a recommendation of a Circuit, Chancery or Court of Appeals Judge and two attorneys licensed to practice law in this state who certify that the applicant was a practicing court reporter on or before January 1, 1983.

Section 3.

- The Board shall set the following fees for the administration of these regulations:
- a. \$75.00 application fee for in-state applicants; \$150.00 application fee for out-of-state applicants. (Amended January 6, 2000.)
 - b. \$50.00 certificate renewal fee. (Amended February 24, 1986; amended October 30, 2003).
 - c. \$100.00 penalty fee for failure to timely remit certificate renewal fee as set forth in Section 9 of these regulations. (Amended July 1, 1991).

Section 4.

Applicants, other than those certified without examination pursuant to Section 6, shall file not later than 30 days prior to the next examination date, a written application in the form prescribed by the Court, together with an application fee as set forth in Section 3 of these Regulations, with the Clerk of the Supreme Court. Said application fee shall not be refunded in the event the applicant decides not to take the examination or fails the examination. Said application shall state by which method the applicant will test, and certification will be issued solely in that method if the applicant successfully passes the examination. (Amended July 1, 1991; amended February 21, 2008.)

Section 5.

Applicants and/or applications shall be screened by the Board, and those deemed eligible to take the examination will be advised of the time and place the tests will be conducted. (Amended July 1, 1991). Any applicant whose application is denied shall be promptly notified of the action of the Board and the application fee shall be refunded.

Section 6.

Applicants for certification, deemed eligible by the Board, shall receive certification upon submitting the application, paying the application fee, and successfully passing the certification examination. Certification shall be issued solely in the method by which the applicant successfully tested. (Amended July 1, 1991).

Section 7.

Examinations for certification shall be held at least semi-annually at times and places set by the Board.

Section 8.

Certification granted by the Board shall remain in effect upon payment of the annual certificate renewal fees to the Clerk of the Supreme Court, on or before January 1 of each year, unless suspended or revoked pursuant to Section 7 of the Rules of the Board of Certified Court Reporter Examiners. (Amended July 1, 1991.)

Section 9.

All certificate renewal fee payments must be postmarked on or before January 1. The Clerk of the Supreme Court shall provide a list of those reporters in violation of the January 1 deadline not later than January 15 to the Executive Secretary of the Board. The Executive Secretary shall thereafter cause a certified letter to be sent to each reporter in violation of the January 1 deadline. The letter shall inform the reporters in violation that their certificate shall be suspended on a date not to exceed 21 calendar days from the certified delivery date of the letter unless all delinquent renewal fees and a \$100.00 penalty fee are received by the Clerk of the Supreme Court within the 21 calendar days. If all delinquent renewal and penalty fees are not received within the 21 calendar days, the certificate shall be suspended but may be reinstated during the remainder of the calendar year in which the certificate expired for failure to timely renew, if the Board finds, based on a sworn affidavit(s) or other credible evidence, that the applicant has retained the professional skills required for original certification and has paid all delinquent renewal and penalty fees. After December 31 of the calendar year in which the certificate expired, an expired certificate shall not be subject to renewal without examination. (Amended July 1, 1991; amended May 3, 1993; amended October 30, 2003; amended September 23, 2004.)

Section 10.

Each certified reporter shall procure a seal upon which shall be engraved the name, certificate number of the reporter, and the words "Arkansas Supreme Court — Certified Court Reporter", said seal to be included, with signature, on all transcript certificates, to ensure compliance with Section 9.

Section 11.

At the discretion of the trial judge, Section 9 may be waived with regard to depositions taken outside this state for use in this state, provided the

court reporter is authorized to take verbatim testimony in the state where the deposition was taken. (Deleted — See Per Curiam, March 14, 1988.)

Section 12.

This Section is hereby repealed. (Amended May 3, 1993; amended February 21, 2008.)

Section 13.

In the event of an emergency where no Certified Court Reporter is immediately available, a judge of a circuit court may, in his or her discretion, grant a one hundred twenty calendar day, non-renewable emergency certificate in order to continue the conduct of the court's business; provided a copy of the one hundred twenty day emergency certificate shall be forthwith filed with the Clerk of the Arkansas Supreme Court and Secretary of this Board. A circuit judge shall not grant an emergency certificate to a court reporter whose court reporter board certification is at the time of the issuance of the emergency certificate revoked or suspended in Arkansas or any other state. (Amended June 16, 1986; amended April 18, 2002.)

Publisher's Notes. By per curiam order dated April 18, 2002, the Supreme Court adopted the recommendations of the Board of Certified Court Reporter Examiners to amendment to Section 13 of the Regulations, which are set out as a note under this section. The amendment deleted the reference to

chancery court and inserted "or her" and "calendar" in the first sentence, and added the last sentence. Amended Section 13 of the Regulations of the Board of Certified Court Reporter Examiners, effective immediately, is set out below.

Section 14.

The tests shall be as follows:

a. A written knowledge test consisting of spelling, vocabulary, punctuation, general knowledge, and rules governing preparation of transcripts (Rules of the Supreme Court and Court of Appeals 3-1, 3-2, 3-3, and 3-4) with a minimum of 75% accuracy.

b.(1) Five minutes of one-voice dictation of literacy at 180 words per minute.

(2) Five minutes of one-voice dictation of jury charge at 200 words per minute.

(3) Five minutes of two-voice dictation of Q and A at 225 words per minute. (Amended February 21, 2008.)

c. Applicants shall be required to transcribe each dictation test with 95% accuracy. (Amended February 24, 1986; amended January 29, 2004.)

d. If an applicant shall pass one or more parts of the test but fail one or more parts, the applicant will not be required to take the part or parts passed at the next successive examination given, but only the part or parts failed. If the applicant does not pass the previously failed part or parts at the next successive examination, the applicant shall be required to retake the entire examination. (Amended February 24, 1986; amended October 30, 2003; amended January 29, 2004.)

e. For in-state applicants, a new application and application fee of \$75.00 will be required for all subsequent testing. For out-of-state

applicants, a new application and application fee of \$150.00 will be required for all subsequent testing. (Adopted January 6, 2000.)

f. Certification will be restricted to the method of reporting used by the applicant at the time of testing, and said method will be reflected on the certificate issued to the applicant upon successfully passing the certification examination. (Amended July 1, 1991.)

g. Each individual successfully passing the certification examination shall, prior to receiving certification from the Board, participate in an orientation session at a time and place set by the Board. (Adopted September 9, 2004.)

Section 15.

Applicants for testing must furnish their own equipment and supplies for reporting and transcribing dictation tests. (Amended July 1, 1991). No applicant is permitted to use an open microphone or other backup recording device during testing.

Section 16.

The content and depth of this examination shall be a continuing subject of review by the Board, and may be altered by amendments to these regulations.

Section 17.

The Executive Secretary of the Board will forward the files containing the names and pertinent information for all individuals who have passed the certification test to the Supreme Court Clerk's office where said files will be maintained and stored.

The Executive Secretary will maintain and store all other files pertaining to test results, including all verbatim notes or records, transcripts, and other papers used in connection with testing for a period of two years following the date of testing, at which time the Executive Secretary may dispose of said files.

It shall be the responsibility of the certified court reporter to provide the Office of the Supreme Court Clerk with written notification of any change of address within fourteen (14) working days.

For the purposes of these regulations, written notification by certified or first class mail to the most recent address provided to the Office of the Clerk shall be deemed sufficient. (Amended May 3, 1993; amended February 21, 2008.)

Section 18.

Any person desiring to file a grievance against a Certified Court Reporter may file a written statement on a form provided by the Board, attaching any pertinent documentary evidence thereto, with the Board of Certified Court Reporters Examiners through the Office of the Clerk of the Arkansas Supreme Court, for delivery to the Executive Secretary of the Board for investigation and determination of probable cause for a formal Complaint. (Amended January 15, 2009.)

Section 19.

Pursuant to Section 7 of the Rule Providing for Certification of Court Reporters, the Board may issue an admonition or revoke or suspend any certificate issued after proper notice and hearing, on the following grounds:

a. Conviction of any felony, or having been adjudicated or found guilty, or entered a plea of guilty or *nolo contendere* to, any felony, or to any misdemeanor that reflects adversely on the reporter's honesty, trustworthiness, or fitness as a reporter in other respects, or to any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy or solicitation of another to commit a felony.

b. misrepresentation or omission of material facts in obtaining certification.

c. any intentional violation of, noncompliance with or gross negligence in complying with any rule or directive of the Supreme Court of Arkansas, any other court of record within this State, or this Board.

d. fraud, dishonesty, gross incompetence or habitual neglect of duty.

e. unprofessional conduct, which shall include, but not be limited to:

1. failing to deliver a transcript to a client or court in a timely manner as determined by statute, court order, or agreement;

2. intentionally producing an inaccurate transcript;

3. producing an incomplete transcript except upon order of a court, agreement of the parties, or request of a party;

4. failing to disclose as soon as practical to the parties or their attorneys existing or past financial, business, professional or family relationships, including contracts for court-reporting services, which might reasonably create an appearance of partiality;

5. advertising or representing falsely the qualifications of a certified court reporter or that an unlicensed individual is a certified court reporter;

6. failing to charge all parties or their attorneys to an action the same price for an original transcript and failing to charge all parties or their attorneys the same price for a copy of a transcript or for like services performed in an action;

7. failing to disclose upon request an itemization in writing of all rates and charges to all parties in an action or their attorneys;

8. reporting of any proceeding by any person, who is a relative of a party or their attorney, unless the relationship is disclosed and any objection thereto is waived on the record by all parties;

9. reporting of any proceeding by any person, who is financially interested in the action, or who is associated with a firm, which is financially interested in the action;

10. failing to notify all parties, or their attorneys, of a request for a deposition transcript, or any part thereof, in sufficient time for copies to be prepared and delivered simultaneously with the original;

11. going "off the record" during a deposition when not agreed to by all parties or their attorneys unless otherwise ordered by the court;

12. giving, directly or indirectly, benefitting from or being employed as a result of any gift, incentive, reward or anything of value to attorneys,

clients, or their representatives or agents, except for nominal items that do not exceed \$100 in the aggregate for each recipient each year; and

13. charging an unreasonable rate for a copy of an original deposition transcript, or an official reporter charging fees in violation of Ark. Code Ann. Section 16-13-506. (Amended March 5, 1984; amended July 1, 1991; amended February 21, 2008; amended January 15, 2009.)

Section 20.

No persons shall use the title “Certified Court Reporter”, or its abbreviation “CCR”, in conjunction with their names to indicate they are qualified verbatim reporters in this state, without having a valid temporary or regular certificate issued by the Board.

Section 21.

OFFICIAL COURT REPORTER RECORDS RETENTION SCHEDULE

PART 1. Scope. a. This records retention schedule applies to all official court reporters in the State of Arkansas. “Official court reporter” as used in this retention schedule means a court reporter, certified by the Arkansas Board of Certified Court Reporter Examiners, who is regularly employed by a circuit judge, or a “substitute court reporter,” who serves in the absence of the regularly employed court reporter.

b. The term “records” as used in this retention schedule refers to any and all verbatim records produced by an official court reporter and all physical exhibits received or proffered in evidence in any court hearing, trial, or proceeding.

PART 2. Court Ordered Retention of Specific Records. Upon the motion of any party demonstrating good cause or upon the court’s own motion, the trial judge may enter an order directing that the records be retained for an additional period beyond the time established in PART 6. At the end of each additional court-ordered retention period, the judge may enter a new order extending the retention period.

PART 3. Responsibility for Storage; Sanctions. a. During the period which the records are required to be retained, it shall be the responsibility of the official court reporter to maintain his or her records in an orderly, secure, and identifiable manner. It is highly recommended that space be provided in the county courthouse in the county where the official court reporter maintains an office or resides. If that is not feasible, it shall be the responsibility of the official court reporter to provide adequate space for the records.

b. When physical exhibits include firearms, contraband, or other similar items, such items may be transferred to the sheriff or other appropriate governmental agency for storage and safekeeping. The sheriff or governmental agency shall sign a receipt for such items and shall acknowledge that the items shall not be disposed of until authorized by subsequent court order. Other items of physical evidence which present storage problems may be transferred to the attorney of record for storage and safekeeping subject to approval of the trial court and upon appropriate documentation. Forms of orders and receipts for the transfer and disposal of exhibits are appended to Regulation 21.

c. If an official court reporter leaves his or her position for any reason other than his or her death, the reporter shall, within thirty (30) days,

deliver or cause to be delivered, those records as defined in PART 1, to the trial court and retained by the court until a subsequent official court reporter is employed or retained, at which time the records shall be transferred to that reporter. A former official court reporter who maintains Arkansas certification may, with the court's permission, temporarily retrieve his or her former records necessary to prepare an appeal transcript or other documents which a party may request.

d. If an official court reporter dies while still in possession of those records subject to retention as defined in PART 1, the trial court shall take possession of those records within thirty (30) days of the official court reporter's death. The trial court shall retain possession of the records until a subsequent official court reporter is employed or retained. At that time the records shall be transferred to the possession of the subsequent official court reporter who shall safely maintain the records subject to the direction of the trial court.

e. Any person who fails to comply with or who interferes with these transfer provisions may be ordered to appear and show cause why he or she should not be held in contempt of court.

PART 4. Methods of Disposal of Records. a. Paper records may be disposed of by burning or shredding.

b. Tapes may be erased and reused or may be dismantled to prevent their replaying.

c. Upon their written request, physical exhibits, other than weapons or contraband shall be returned to the party or attorney who proffered same. If no request is made within the time period for retention, the court reporter may dispose of the exhibit.

d. Exhibits such as weapons or contraband shall be disposed of in the following manner: (1) weapons, in whatever form, unless otherwise ordered by the trial court, shall be transferred to the sheriff, or his or her designee, in the county where the case was tried, for disposal pursuant to law; (2) contraband, in whatever form, shall be transferred to the sheriff, or his or her designee, in the county where the case was tried, for disposal pursuant to law.

PART 5. Log of Records, Sanctions. a. Each official court reporter shall maintain an accurate, orderly log of his or her records which also notes the date and method of destruction of each record listed. Any work papers maintained by the reporter for the purpose of identifying the record of court proceedings shall suffice, as long as they are legible. When an official court reporter leaves his or her position for whatever reason, the trial court shall take possession of the log no later than the date he or she takes possession of the records as set out in PART 3. When a subsequent official court reporter is employed or retained, the log shall be transferred to the possession of the subsequent official court reporter who shall safely maintain the log subject to the direction of the trial court.

b. Any person who fails to comply with or who interferes with this Section may be ordered to appear and show cause why he or she should not be held in contempt of court.

Part 6 of the Per Curiam dated Oct. 16, 1995, set out the Official Court Reporter Retention Schedule:

TYPE OF CASE**PERIOD OF RETENTION****Criminal Cases**

Death Penalty

Permanently

Life in Prison w/o Parole

Permanently

Other Felonies (transcript lodged with appellate court)

90 days after Mandate issues

Other Felonies (no transcript prepared)

5 years from date of verdict or sentencing

Misdemeanors

2 years from date of sentencing

Grand Jury Proceedings

1 year subsequent to adjournment

Civil Circuit

All Cases (transcript lodged with appellate court)

90 days after Mandate issues

All Cases (no transcript prepared)

2 years from date of final order of trial court

Juvenile Division of Circuit Court

All Cases (transcript lodged with appellate court)

90 days after Mandate issues

Cases Where No Transcript is Prepared:

Delinquency

3 years from date of final order of trial court or on date of expungement order, whichever occurs first

Families in Need of Services (FINS)

3 years from date of final order of trial court

Dependent/Neglect

7 years from date of final order of trial court

Part 7 of the Per Curiam dated Oct. 16, 1995, provided:

Effective Date. This Official Court Reporter Records Retention Schedule is effective immediately upon publication. It applies to records of cases already tried and those to be tried.

APPENDIX (Regulation 21)

Receipt and Acknowledgment Order for Transfer of Trial Court Exhibits
IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS
_____ DIVISION

V. NO. _____

DEFENDANT

ORDER

The following exhibits in the above-styled case are hereby ordered transferred for storage and safekeeping to:

Exhibit No. _____	(DESCRIPTION)
Exhibit No. _____	
Exhibit No. _____	
Exhibit No. _____	
Exhibit No. _____	

THESE ITEMS MAY NOT BE DISPOSED OF WITHOUT THE COURT'S PERMISSION EVIDENCED BY A WRITTEN ORDER.

IT IS SO ORDERED.

Circuit Judge

Date

I ACKNOWLEDGE RECEIPT OF THE PHYSICAL EXHIBITS DESCRIBED ABOVE AND FURTHER ADKNOWLEGE MY UNDERSTANDING THAT THESE ITEMS MAY NOT BE DISPOSED OF WITHOUT FURTHER ORDER OF THE COURT, AND I AGREE TO RETURN THESE ITEMS TO THE COURT WHEN SO DIRECTED.

(SHERIFF/GOVERNMENTAL
AGENCY/ATTORNEY OR OTHER
ENTITY)

Date

[Receipt shall be filed in case file with the circuit clerk]

APPENDIX (Regulation 21)

Order for Disposal of Trial Court Exhibits and Acknowledgment of
Receipt for Disposal

IN THE CIRCUIT COURT OF _____ COUNTY, ARKANSAS
_____ DIVISION

PLAINTIFF

V.

NO.

DEFENDANT

ORDER

The following exhibits in the above-styled case may be disposed of in a manner consistent with the Regulations of the Board of Certified Court Reporter Examiners:

Exhibit No. _____ (DESCRIPTION)

Exhibit No. _____

Exhibit No. _____

Exhibit No. _____

[The exhibit(s) shall be transferred to _____ for disposal pursuant to law.]

IT IS SO ORDERED.

Circuit Judge

Date

I ACKNOWLEDGE RECEIPT OF THE PHYSICAL EXHIBITS DESCRIBED ABOVE FOR DISPOSAL PURSUANT TO LAW.

(SHERIFF/GOVERNMENTAL
AGENCY/ATTORNEY OR OTHER
ENTITY)

Date

[Receipt shall be filed in case file with the circuit clerk]

(Amended February 21, 2008.)

Section 22.

a. The purpose of this rule is to ensure the integrity of the record and to avoid the appearance or potential for deferential treatment of parties to an action. Court reporters serve as officers of the court and both the appearance and existence of impartiality are no less important for officers who take depositions than for judicial officers and other persons whose responsibilities are integral to the administration of justice.

b. The court reporter taking the deposition, or the firm or any other person or entity with whom such court reporter has a principal and agency relationship or is otherwise associated, shall not enter into a contractual or financial agreement, arrangement or relationship for court reporting services, whether written or oral, with any attorney, party to an action, insurance company, third-party administrator, or any other person or entity that has a financial interest in an action, which gives the appearance that the impartiality and independence of the court reporter has been compromised. Specific examples of arrangements that are prohibited include ones that:

1. establish rates and terms for court reporting services that extend beyond a single case, action, or proceeding;

2. include a court reporter on any list of preferred providers of court reporting services after exchanging information and reaching an agreement specifying the prices or other terms upon which future court reporting services will be provided, whether or not the services actually are ever ordered;

3. allow the format of the transcript to be manipulated to affect pricing;

4. require the court reporter taking the deposition to relinquish control of an original deposition transcript and copies of the transcript before it is certified;

5. fail to offer comparable services, in both quality and price, to all parties or otherwise require the court reporter to provide special financial terms or other services that are not offered at the same time and on the same terms to all other parties in the litigation;

6. allow the court reporter to communicate directly with a party of interest, other than a *pro se* party, except to provide invoices; and

7. base the compensation of the court reporter on the outcome or otherwise give the court reporter a financial interest in the action.

c. These prohibitions do not apply to situations where fees or special services may be negotiated, provided that they are the same for all parties and are negotiated on a case-by-case basis. Also, these prohibitions do not extend to governmental entities, if they are required by law to obtain court reporting services on a long-term basis through competitive bidding.

d. Any violation of these prohibitions shall be enforceable by the court in which the underlying action is pending. Without otherwise limiting the inherent powers and discretion of the court, a deposition taken in violation of these prohibitions shall constitute a violation of Rule 28(d) of the Arkansas Rules of Civil Procedure (disqualification for interest), and be subject to all sanctions for such a violation under the Rules of Civil Procedure. In addition, any court reporter, firm, attorney, or party that willfully violates these prohibitions may be subject to fine or sanction by the court, and a court reporter may be subject to disciplinary proceedings before the Board of Certified Court Reporter Examiners.

e. These rules shall be applicable to all court reporting services provided on or after February 21, 2008. (Adopted March 4, 1999; amended February 21, 2008.)

Section 23.

A Certified Court Reporter may administer oaths to witnesses in court proceedings, depositions, grand jury proceedings, or as otherwise authorized by a court of record. (Adopted October 30, 2003.)

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APPENDIX TO DISCIPLINARY ENFORCEMENT RULES

Publisher's Notes. General Order No. 42, dated Feb. 22, 1994, provided: "After careful study of the amendments to the Federal Rules of Civil Procedure which were effective December 1, 1993, the court has determined, in conformity with its Civil Justice Expense and Delay Reduction Plan, that it is in the best interest of the citizens and litigants of this district for this court to "opt out" of certain provisions of such amendments as specifically permitted by said amendments. For many of

the reasons delineated in the dissenting opinion of Justice Scalia (H.R. Doc. No. 74, 103d Cong., 1st Sess. at 104-110 (1993)) to the order of the Supreme Court adopting the amendments and transmitting them to Congress pursuant to Section 2072 of Title 28, United States Code, and for other reasons, the court has concluded that the requirements and mandates of several of such amendments are unnecessary in this district and are unduly burdensome, working an un-

necessary hardship and potential increase in litigation costs on litigants and attorneys with cases in this district.

"IT IS ORDERED THAT:

Rule 26(a) — Initial Disclosures. Unless otherwise directed by a judge of this court or mutually agreed to by the parties, parties or their attorneys are not required to comply with the provisions of Rule 26(a)(1) through 26(a)(4). Parties will continue to comply with the provisions of pretrial orders and other orders entered by the trial judge to whom a case is assigned in respect to disclosure of witnesses, including expert witnesses, and other disclosures and production that would otherwise be required by the provisions of Rule 26(a)(2) and (3).

"Rules 26(d) and 26(f) — Commencement of Discovery and Meeting of the Parties. Parties and counsel will not be required to comply with the provisions of Rule 26(d) prohibiting the parties from seeking discovery until after the parties have met and conferred as required by Rule 26(f). The court urges, encourages and expects that the attorneys will confer in good faith in respect to

discovery, and that the discovery and other trial preparation necessary to prepare a case for trial shall be completed as expeditiously and inexpensively as possible, with intervention of the court being sought only after compliance with the provisions of Rules 26(c) and 37(a)(2)(A) of the Federal Rules of Civil Procedures and Rule C-7(g) (formerly Rule 20(g)) of this court's Local Rules. However, the court will not require the formal conference and paper work required by Rule 26(f) and also "opts out" of that provision. Parties and counsel shall comply with all other provisions of Rule 26(d).

"Rule 26(b)(2) and Rules 30, 31, and 33 — Limits on Formal Discovery. As permitted by Rule 26(b)(2), the court will not, except on a case by case basis, limit the number of depositions or interrogatories. Thus, the court "opts out" of the provisions of Rules 30, 31, and 33 which blindly and without consideration of the requirements of the case at hand, limit such discovery."

"This order supersedes General Order [No.] 41 entered December 27, 1993."

Rule 4.1. Service of process.

(a) Counsel shall be responsible for preparing all process on forms to be supplied by the Clerk. When process is to be served by the United States Marshal, counsel shall complete the required form.

(b) Counsel seeking service of process by certified mail of a pleading filed in the Eastern and Western Districts of Arkansas upon a defendant other than the United States, or any officer or agency thereof, shall proceed in accordance with Rule 4 of the Arkansas Rules of Civil Procedure.

(c) When such service by certified mail has been completed, counsel shall file an affidavit with the Clerk reflecting completion of service with a copy of the return receipt attached. (Adopted March 2, 1981, and effective May 1, 1981; amended May 1, 1985; amended January 2, 1990.)

Rule 4.2. Costs and bonds.

(a) *Costs.* Parties instituting any civil action, suit, or proceeding, whether by original action, removal or otherwise, shall pay to the Clerk the filing fee as required by the Judicial Conference of the United States. The Clerk will not accept for filing any tendered pleading for the institution of a civil action without advance payment of the filing fee, unless the court shall order otherwise.

(b) *Bond for Costs.* The Court, on motion or of its own initiative, may order any party plaintiff, either resident or nonresident, to file an original bond for costs or additional security for costs in such an amount and so conditioned as the Court by its Order may designate. (Adopted and effective May 1, 1980; amended July 1, 1988; amended January 2, 1990.)

Publisher's Notes. General Order No. 46 provided: "The Clerk is authorized, upon the final completion of each case, to refund to the

appropriate party cash bail in criminal matters and cash bonds for costs in civil cases."

Rule 4.3. Bondsmen.

No officer of either District Court, employee of the Department of Justice, or attorney at law shall be accepted as surety on any bond or undertaking in any action or proceeding in either District Court. (Adopted and effective May 1, 1980.)

Rule 5.1. Filing of documents by electronic means.

Documents may be filed, signed and verified by electronic means to the extent and in the manner authorized by the CM/ECF Administrative Manual approved by the court. A document filed by electronic means in compliance with this Local Rule constitutes a written paper for the purposes of these Local Rules, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. (Adopted and effective May 26, 2005.)

Rule 5.2. Service of documents by electronic means.

Documents may be served through the court's transmission facilities by electronic means to the extent and in the manner authorized by the CM/ECF Administrative Manual approved by the court. Transmission of the Notice of Electronic Filing through the court's transmission facilities constitutes service of the filed document upon each party in the case who is registered as a Filing User. Any other party or parties shall be served documents according to these Local Rules and either the Federal Rules of Civil Procedure or the Federal Rules of Criminal Procedure. (Adopted and effective May 26, 2005.)

Rule 5.4. Time for filing under Federal Rules of Civil Procedure 5(d).

Seven days is hereby construed to be a "reasonable time" after service within which papers shall be filed under the provisions of Federal Rules of Civil Procedure 5(d). (Adopted and effective May 1, 1980; amended November 10, 2009.)

Rule 5.5. Pleadings and filings.

(a) The original of all pleadings, motions, and other papers, together with two copies thereof, shall be filed with the Clerk. All pleadings, motions, and other papers shall be typewritten, photocopied, mimeographed, or printed in type not less than elite, in double space, letter size, using only one side of the page, and shall be filed by the Clerk unfolded and without manuscript covers. Attorneys shall take notice of case numbers assigned to each case and shall note such numbers upon all pleadings, orders, and judgments.

(b) Pleadings, motions, and other papers are to be filed as follows:

(1) In the Eastern District, the Clerk maintains staffed offices at Little Rock, Pine Bluff, and Jonesboro. In the Western District, the Clerk maintains offices at Fort Smith, Fayetteville, El Dorado, Texarkana, and Hot Springs. In civil matters, pleadings, motions, and other papers should be

filed in the office of the Clerk designated in Local Rule 77.1 for the Division in which the case is pending, but when a Clerk is unavailable, they may be filed in any office of the Clerk in the appropriate district.

(2) *Criminal matters in the Eastern District.* All pleadings, motions, and other papers in all criminal matters are to be filed in Little Rock.

(3) *Criminal matters in the Western District.* All pleadings, motions and other papers in criminal matters in the Harrison Division shall be filed in Fayetteville. Otherwise, all pleadings, motions, and other papers in criminal matters for a particular division are to be filed in that division.

(c)(1) *Parties represented by counsel.* Every pleading, motion, or other paper (except a pro se motion to discharge an attorney) filed in behalf of a party represented by counsel shall be signed by at least one attorney of record in his or her individual name, and the attorney's address, zip code, and telephone number, and Arkansas Supreme Court identification number, or other Supreme Court identification number, if applicable, shall be stated. It is the duty of each attorney to promptly notify the Clerk and the other parties to the proceedings of any change in his or her address.

(2) *Parties appearing pro se.* It is the duty of any party not represented by counsel to promptly notify the Clerk and the other parties to the proceedings of any change in his or her address, to monitor the progress of the case, and to prosecute or defend the action diligently. A party appearing for himself/herself shall sign his/her pleadings and state his/her address, zip code, and telephone number. If any communication from the Court to a pro se plaintiff is not responded to within thirty (30) days, the case may be dismissed without prejudice. Any party proceeding pro se shall be expected to be familiar with and follow the Federal Rules of Civil Procedure.

(d). At the time of filing a civil action, the plaintiff shall complete and submit a cover sheet statement on Federal Form No. JS44.

(e) A party who moves to amend a pleading shall attach a copy of the amendment to the motion. The motion must contain a concise statement setting out what exactly is being amended in the new pleading — e.g. added defendant X, adding a claim for X, corrected spelling. Any amendment to a pleading, whether filed as a matter of course or upon a motion to amend, must, except by leave of Court, reproduce the entire pleading as amended, and may not incorporate any prior pleading by reference. The party amending shall file the original of the amended pleading within seven (7) days of the entry of the order granting leave to amend unless otherwise ordered by the Court. The requirements for amending pleadings set forth in this subsection of Rule 5.5 shall not apply to parties proceeding pro se.

(f) Proposed findings of fact and conclusions of law, trial briefs, and proposed jury instructions shall be submitted to the judge to whom the case is assigned, with copies served upon all other parties. (Adopted effective May 1, 1980; subsection designated as (c) adopted and effective March 14, 1984; subsection (e) adopted and effective July 16, 1980; subsections (f) through (j) adopted and effective June 26, 1981; amended October 27, 1986; amended July 1, 1988; amended January 2, 1990; former subsections (f) through (h) and (j) deleted effective December 1, 2000; amended April 30, 2007; amended September 20, 2007; amended November 10, 2009.)

Publisher's Notes. For guidelines for filing discovery documents in all pending civil cases, i.e., the initial disclosures pursuant to F. R. Civ. P. 26(a)(1), the expert disclosures

pursuant to F. R. Civ. P. 26(a)(2), and pretrial disclosures pursuant to F. R. Civ. P. 26(a)(3), see the court's website at: www.are.uscourts.gov/notices/discovery.pdf.

Rule 6.2. Extension of time to plead.

(a) If the time originally prescribed has not expired and if all counsel consent in writing, the Clerk may enter an order extending for not more than twenty-one (21) days the time to file a responsive pleading or to respond to discovery. The Court may suspend, alter, or rescind the order on its own motion or upon the motion of a party. All other extensions of time shall require approval by the Court, except that when the appropriate judge is not available, approval may be granted by another judge or a magistrate judge.

(b) In every motion for a continuance, every motion for any extension of time, or for leave to do any act out of time, the motion shall state that the movant has contacted the adverse party (or parties) with regard to the motion, and also state whether the adverse party opposes or does not oppose same. If any such motion does not contain the statements required by this rule or, alternatively, a statement setting forth extraordinary circumstances which make it impracticable to contact the adverse party (or parties), the motion may be dismissed summarily for failure to comply with this rule. Repeated failures to comply will be considered an adequate basis for the imposition of sanctions. (Subsection (a) adopted and effective May 1, 1980; subsection (b) effective April 15, 1989; amended November 10, 2009.)

Rule 7.2. Motions.

(a) All motions except those mentioned in paragraph (d) shall be accompanied by a brief consisting of a concise statement of relevant facts and applicable law. Both documents shall be filed with the Clerk, and copies shall be served on all other parties affected by the motion.

(b) Within fourteen (14) days from the date of service of copies of a motion and supporting papers, any party opposing a motion shall serve and file with the Clerk a concise statement in opposition to the motion with supporting authorities. A party moving for summary judgment will have seven (7) days to file a reply in further support of the motion. For cause shown, the court may by order shorten or lengthen the time for the filing of responses and replies.

(c) If a motion requires consideration of facts not appearing of record, the parties may serve and file copies of all photographs, documents, or other evidence deemed necessary in support of or in opposition to the motion, in addition to affidavits required or permitted by the Federal Rules of Civil Procedure.

(d) No brief is required from any party, unless otherwise directed by the Court, with respect to the following motions:

(1) To extend time for the performance of an act required or allowed to be done, provided request is made before the expiration of the period originally prescribed, or as extended by previous order.

(2) To obtain leave to file supplemental or amended pleadings.

(3) To appoint an attorney or guardian ad litem.

(4) To permit substitution of parties or attorneys.

(e) Pretrial motions for temporary restraining orders, motions for preliminary injunctions, and motions to dismiss, shall not be taken up and considered unless set forth in a separate pleading accompanied by a separate brief.

(f) The failure to timely respond to any nondispositive motion, as required by the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or by any local rule, shall be an adequate basis, without more, for granting the relief sought in said motion.

(g) All motions to compel discovery and all other discovery-enforcement motions and all motions for protective orders shall contain a statement by the moving party that the parties have conferred in good faith on the specific issue or issues in dispute and that they are not able to resolve their disagreements without the intervention of the Court. If any such motion lacks such a statement, that motion may be dismissed summarily for failure to comply with this rule. Repeated failures to comply will be considered an adequate basis for the imposition of sanctions. (Subsections (a) through (d) adopted and effective May 1, 1980; subsection (b) amended to change to eleven days effective July 1, 1988; subsection (e) adopted and effective July 14, 1986; subsection (f) adopted and effective July 1, 1988; subsection (g) effective April 15, 1989; amended January 2, 1990; amended November 10, 2009; amended May 20, 2010.)

Rule 7.3. Communications with court.

(a) Attorneys shall not communicate in writing with the Court concerning any pending case unless copies of the writing are served on all attorneys for all other parties in the case. Attorneys shall not furnish the Court copies of correspondence among themselves relating to matters in dispute which are not then before the Court for resolution. Such dispute should either be settled by counsel or made the subject of a formal motion. This rule has special application to correspondence relating to specific money demands and offers in settlement.

(b) Ex parte oral communications with the Court on substantive matters by counsel or a party concerning a pending action are prohibited except when permitted by Federal Rules of Civil or Criminal Procedure. (Adopted and effective May 1, 1980.)

Rule 7.4. Stipulations by counsel.

The court will not recognize any agreement between counsel, if counsel differ as to its terms, unless the agreement has been reduced to writing. (Adopted and effective May 1, 1980.)

CASE NOTES

In General.

Following an automobile accident, the court denied auto company's motion to enforce an agreement with driver's counsel to produce non-party witness statements; the letter from driver's counsel stated that he would search

his file for statements but there was no promise to produce the statements and, thus, there was no promise in writing as required by this rule. *Schipp v. GMC*, 457 F. Supp. 2d 917 (E.D. Ark. 2006).

Rule 7.5. Continuances.

(a) No motion for continuance of any hearing will be granted except for good cause.

(b) In no case will an agreement by counsel for a continuance be recognized except by consent of the Court.

(c) Cases set for trial but not reached on that day shall retain their relative position on the trial calendar to the extent practicable.

(d) The Court may condition a continuance upon the payment of the expenses caused to the other parties and of jury fees incurred by the Court. (Adopted and effective May 1, 1980.)

Rule 9.1. Complaint forms for actions by incarcerated persons.

All actions under 42 U.S.C. § 1983, 28 U.S.C. § 2241 or 28 U.S.C. § 2254 filed in this district by incarcerated persons shall be submitted on the court-approved forms supplied by the Court unless a district judge or magistrate judge, upon finding that the complaint is understandable and that it conforms with local rules and the Federal Rules of Civil Procedure, in his or her discretion, accepts for filing a complaint that is not submitted on the approved form. (Adopted and effective May 1, 1980; revised and effective January 1-2, 1988; revised and approved April 1, 1999.)

Rule 16.1. Initial Scheduling Order.

In all civil actions except those exempted by Local Rule 16.2, an Initial Scheduling Order will issue setting forth the date by which the parties must hold their Fed. R. Civ. P. 26(f) conference, the date by which the parties must submit their Fed. R. Civ. P. 26(f) report, a tentative date for a Fed. R. Civ. P. 16(b) conference, and a proposed trial date.

After the court receives the parties' 26(f) report and, if necessary, holds the 16(b) conference, the court will issue a Final Scheduling Order.

The requirements for the Fed. R. Civ. P. 26(f) report are set out in Local Rule 26.1.

The requirements for the Fed. R. Civ. P. 26(a)(3) pretrial disclosure sheet are set out in Local Rule 26.2. (Adopted and effective May 1, 1980; amended effective December 1, 2000.)

Rule 16.2. Exempt actions.

The following categories of cases are exempt from the Fed. R. Civ. P. 16(b) Scheduling Order:

1. Actions for review of an administrative record;
 2. Habeas corpus petitions;
 3. Pro se actions brought by persons in federal, state or local custody;
 4. Actions to enforce or quash administrative summons or subpoena;
 5. Actions by the United States to recover benefit payments or to collect on student loans;
 6. Proceedings ancillary to proceedings in other courts; and
 7. Actions to enforce arbitration awards.
8. Eminent domain and foreclosure actions. (Adopted and effective March 14, 1984; amended December 1, 2000; amended December 3, 2002.)

Rule 23.1. Class actions.

Caption and Class Action Allegations. In any case sought to be maintained as a class action:

(1) The complaint shall bear the caption "Complaint — Class Action" next to, or under, the style of the case.

(2) The complaint shall contain a separate paragraph captioned "Class Action Allegations" which shall set forth, inter alia:

(a) A reference to the portion or portions of Fed.R.Civ.P. 23 under which it is claimed that the suit is properly maintainable as a class action; and

(b) Allegations in support of this claim, including, but not necessarily limited to:

(i) the size (in numbers) or approximate size and definition of the alleged and proposed class;

(ii) the basis upon which the plaintiff claims (a) to be an adequate representative of the class, or (b) if the class is composed of defendants, the basis upon which plaintiff claims that the named defendant (or defendants) is an adequate representative of the class;

(iii) the specific questions of law and fact claimed to be common to any class alleged; and

(iv) in actions claimed to be maintainable as class actions under Fed.R.Civ.P. 23(b)(3), allegations in support of the findings required by that subdivision.

(3) The deadline for filing a motion for class certification will be set in the Final Scheduling Order (see Local Rule 26.1(13)). The motion shall particularize the facts believed to warrant class or subclass certification and indicate if those facts have been established by stipulations, admissions, or discovery. If a hearing is believed necessary, the motion shall so state. The other parties shall respond to said motion within fourteen (14) days specifically admitting or denying the facts alleged and setting forth any additional or contrary facts believed pertinent to the class action determinations required. Such responses shall also state whether a hearing is believed necessary. Both the motion and responses shall be accompanied by a memorandum of law covering all issues relating to class certification. In ruling upon such a motion, the Court may allow the action to be so maintained, strike the class action allegations, or postpone the determination pending further discovery or other preliminary proceedings. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion.

Failure to move for class determination and certification by the deadline set in the Final Scheduling Order shall constitute and signify an intentional abandonment and waiver of all class action allegations contained in the complaint and same shall proceed as an individual, non-class action thereafter and shall be transferred by the Clerk from the Class Action Docket to the regular civil docket. If any motion for class determination or certification is filed after the deadline provided in the Final Scheduling Order, it shall not have the effect of reinstating the class allegations unless and until it is acted upon favorably by the Court upon a finding of excusable neglect and good cause.

(4) The foregoing provisions shall apply, with appropriate adaptations, to any counterclaim or cross-claim alleged to be brought for or against a class. (Adopted and effective May 1, 1980; amended May 1, 2002; amended November 10, 2009.)

Rule 26.1. Outline for Fed. R. Civ. P. 26(f) report.

The Fed. R. Civ. P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:

(1) Any changes in timing, form, or requirements of mandatory disclosures under Fed. R. Civ. P. 26(a).

(2) Date when mandatory disclosures were or will be made.

(3) Subjects on which discovery may be needed.

(4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media. If so:

(a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;

(b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business;

(c) the format and media agreed to by the parties for the production of such data as well as agreed procedures for such production;

(d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;

(e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.

(5) Date by which discovery should be completed.

(6) Any needed changes in limitations imposed by the Federal Rules of Civil Procedure.

(7) Any Orders, e.g. protective orders, which should be entered.

(8) Any objections to initial disclosures on the ground that mandatory disclosures are not appropriate in the circumstances of the action.

(9) Any objections to the proposed trial date.

(10) Proposed deadline for joining other parties and amending the pleadings.

(11) Proposed deadline for completing discovery. (Note: In the typical case, the deadline for completing discovery should be no later than sixty (60) days before trial.)

(12) Proposed deadline for filing motions other than motions for class certification. (Note: In the typical case, the deadline for filing motions should be no later than sixty (60) days before trial.)

(13) Class certification: In the case of a class action complaint, the proposed deadline for the parties to file a motion for class certification. (Note: In the typical case, the deadline for filing motions for class certification should be no later than ninety (90) days after the Fed. R. Civ. P. 26(f) conference.) (Adopted and effective December 1, 2000; amended May 1, 2002.)

Rule 26.2. Outline for Fed. R. Civ. P. 26(a)(3) pretrial disclosure sheet.

The Fed. R. Civ. P. 26(a)(3) Pretrial Disclosure Sheet filed with the court must contain:

(1) The identity of the party submitting information.

(2) The names, addresses, and telephone numbers of all counsel for the party.

(3) A brief summary of claims and relief sought.

(4) Prospects for settlement. (Note: The Court expects attorneys to confer and explore the possibility of settlement prior to answering these inquiries.)

(5) The basis for jurisdiction and objections to jurisdiction.

(6) A list of pending motions.

- (7) A concise summary of the facts
- (8) All proposed stipulations.
- (9) The issues of fact expected to be contested.
- (10) The issues of law expected to be contested.
- (11) A list and brief description of exhibits, documents, charts, graphs, models, schematic diagrams, summaries, and similar objects which may be used in opening statement, closing argument, or any other part of the trial, other than solely for impeachment purposes, whether or not they will be offered in evidence. Separately designate those documents and exhibits which the party expects to offer and those which the party may offer.
- (12) The names, addresses and telephone numbers of witnesses for the party. Separately identify witnesses whom the party expects to present and those whom the party may call. Designate witnesses whose testimony is expected to be presented via deposition and, if not taken stenographically, a transcript of the pertinent portion of the deposition testimony.
- (13) The current status of discovery, a precise statement of the remaining discovery and an estimate of the time required to complete discovery.
- (14) An estimate of the length of trial and suggestions for expediting disposition of the action.
- (15) The signature of the attorney.
- (16) Proof of service. (Adopted and effective December 1, 2000.)

Publisher's Notes. For guidelines for filing discovery documents in all pending civil cases, i.e., the initial disclosures pursuant to F. R. Civ. P. 26(a)(1), the expert disclosures

pursuant to F. R. Civ. P. 26(a)(2), and pretrial disclosures pursuant to F. R. Civ. P. 26(a)(3), see the court's website at: www.are.uscourts.gov/notices/discovery.pdf.

Rule 33.1. Interrogatories and requests.

(a) Parties answering interrogatories under Fed. R. Civ. P. 33, requests for production under Fed. R. Civ. P. 34, or requests for admissions under Fed. R. Civ. P. 36, shall repeat the interrogatories or requests being answered immediately preceding the answers.

(b) A blanket objection to a set of interrogatories, requests for admissions, or requests for production will not be recognized. Objections must be made to the specific interrogatory or request, or to a part thereof if it is compound. It is not sufficient to state that the interrogatory or request is burdensome, improper, or not relevant. The ground or grounds for the objection must be stated with particularity.

(c) Requests for admissions will not be combined with other discovery material or documents. (Adopted and effective May 1, 1980; subsections (d) and (e) adopted and effective May 1, 1985; amended January 2, 1990; amended December 1, 2000; amended May 1, 2002.)

Rule 40.1. Assignment of actions and proceedings.

(a) All civil and criminal actions and proceedings shall be assigned by a random selection process as the judges from time to time direct.

(b) No person shall take any action designed to cause the assignment of any proceeding to a particular judge. The method of assignment shall assure that the identity of the assigned judge will not be disclosed by the Clerk, nor by any member of his staff, nor by any other person, until after filing. It shall also be designed to prevent any litigant from choosing the judge to whom an

action or proceeding is to be assigned. Any attempt by any attorney to vary this intent shall constitute grounds for discipline, including disbarment.

(c) *Voluntary Nonsuits*. When the plaintiff takes a voluntary nonsuit in a case and subsequently refiles that same case, the Clerk will assign it to the judge who handled it at the time of the entry of the nonsuit order.

To assist the Court and the Clerk's office in carrying out the provision of this rule, the refiled complaint shall contain a brief paragraph identifying, by style and case number, the former proceeding in which the voluntary nonsuit was entered and the name of the judge handling the case at the time of the entry of said voluntary nonsuit order.

NOTE: Attorneys practicing in the Eastern District of Arkansas should consult General Order 39 (attached) for further details on the application of this rule in special situations.

(Subsections (a) and (b) adopted and effective May 1, 1980; subsection (c) adopted and effective July 16, 1980; Note adopted and effective September 24, 1992; amended November 10, 2009.)

Publisher's Notes. General Order No. 39 provided: "(a) All actions and proceedings shall be assigned by a random selection process, except as specifically set out in section (b) of this rule.

"(b) Civil cases shall be assigned directly to a particular judge only in the following circumstances:

"(1) *Voluntary Nonsuit*. When the plaintiff takes a voluntary nonsuit in a case and subsequently refiles that same case, the clerk will assign it to the judge who handled it at the time of the entry of the nonsuit order. The refiled complaint shall contain a brief paragraph identifying, by style and case number, the former proceedings in which the voluntary nonsuit was entered and the name of the judge handling the case when the voluntary nonsuit order was entered.

"(2) *Bankruptcy Jury Trials*. When a party to a bankruptcy case demands a jury trial, the randomly drawn district judge who determines that there is a bona fide jury issue shall be assigned the case directly.

"(3) *Habeas Corpus* Petitions. Once a *habeas corpus* petition has been randomly assigned, all successive petitions emanating from the same state criminal proceeding on which the first petition was based shall be assigned directly to the judge/magistrate who handled the first petition.

"(4) *Civil Cases Attacking Federal Sentence*. Civil cases, filed pursuant to 28 U.S.C. § 2255, attacking a sentence imposed by a federal court shall be assigned directly to the sentencing judge in the criminal case.

"(5) *Related Cases*. There may be rare situations in which a party believes a new civil case should be directly assigned to a particular judge because the new case is closely related to a prior closed case and the assignment thereof to a different judge would result

in a significant waste of judicial time. If a plaintiff believes judicial economy requires such a direct assignment, he or she should so indicate by a separate pleading to be entitled 'Notice of Related Case' to be filed contemporaneously with the complaint and served with the complaint upon the defendant(s).

"The Notice of Related Case shall identify, by style and case number, the prior case and shall contain a brief statement setting out why judicial economy dictates direct assignment to a particular judge. When a plaintiff files such a pleading, the new case shall be tentatively assigned to the judge who handled the prior case. The adverse party(ies) shall have fourteen days after receiving the 'Notice of Related Case' within which to file a brief statement opposing such 'related case' assignment. After reviewing the cases and the submissions of the parties to determine whether the cases are closely related and whether such non-random assignment is likely to result in significant savings of judicial resources, the judge assigned the new case may, in his or her sole discretion, decide either to keep the new case or to notify the clerk to assign the new case by random draw. The decision of the judge is final and not subject to review.

"If a party other than the plaintiff believes a new case should be directly assigned to a judge who handled a prior closely related case, that party should file a 'Notice of Related Case' with its first pleading and serve a copy thereof on all other parties. Such other parties shall have fourteen days after receiving such 'Notice of Related Case' within which to file a brief statement opposing such 'related case' assignment. The clerk shall submit a copy of the complaint, the first pleading together with the Notice of Related Case and any responses thereto to the judge who pre-

sided over the prior case. After reviewing the cases and the submissions of the parties to determine whether they are closely related and whether such non-random assignment is likely to result in significant savings of judicial resources, the judge in the prior case may, in his or her sole discretion, notify the clerk to leave the random case assignment as it is, or to transfer the case to his or her docket as a related case. The decision of the judge is final and not subject to review.

“(6) Civil Forfeiture. When a civil forfeiture action arises out of a previously filed criminal case, the clerk shall directly assign the civil forfeiture action to the judge who handled the criminal case.

“(c) Consolidation of Civil Cases. Any party to a civil case may move for consolidation of pending cases. If such motion is granted, the consolidation cases will be assigned to the judge with the lower (lowest) case number.

“(d) Criminal Cases. Criminal cases shall be assigned solely on a random selection basis. In no event shall any criminal case or proceeding be directly assigned to a judge as a

related case. However, any party to a criminal case may move for consolidation of pending cases. If such motion is granted, the consolidated cases will be assigned to the judge with the lower (lowest) case number.

“(e) No person shall take any action designed to cause the assignment of any proceeding to a particular judge contrary to the provisions of this rule. The method of assignment shall assure the identity of the assigned judge will not be disclosed by the clerk, the clerk’s staff, nor by any other person, until after filing. It shall also be designed to prevent any litigant from choosing the judge to whom an action or proceeding is to be assigned. Any attempt by any attorney to vary this intent shall constitute grounds for discipline, including disbarment. Any act by any employee of this Court done for the purpose of causing the assignment of any case or proceeding contrary to the provisions of this rule shall be considered a proper basis for immediate discharge.

“It is hereby ORDERED this 4th day of May, 2001.”

Rule 41.1. Notice of settlement.

When a case set for trial is settled out of court, it shall be the duty of counsel to so inform the Clerk and the Court as soon as practicable. In a civil case, the court may require counsel who violate this rule to pay the per diem of all jurors who attend court unnecessarily because of counsel’s delay in notifying the Clerk of the settlement. (Adopted and effective May 1, 1980.)

Rule 47.1. Conditions for juror contact.

No juror shall be contacted without express permission of the Court and under such conditions as the Court may prescribe. (Previous Rule 25 adopted 1-2-81 is rescinded and this new Rule 47.1 is adopted effective July 1, 1988.)

Rule 54.1. Attorney’s fees.

(a) In any case in which an attorney’s fees are recoverable under the law applicable to that case, a motion for attorney’s fees shall be filed with the Clerk, with proof of service, within fourteen (14) days after the entry of judgment or an order of dismissal under circumstances permitting the allowance of attorney’s fees. In the event a post-trial motion is filed, this 14-day period shall not commence until entry of the order granting or denying the post-trial motion. Objections to an allowance of fees must be filed within fourteen (14) days after service on the party against whom the award to attorney’s fees is sought. A failure to present a timely petition for an award of attorney’s fees may be considered by the Court to be a waiver of any claim for attorney’s fees.

(b) On its own motion, the Court may grant an allowance of reasonable attorney’s fees to a prevailing party in appropriate cases.

(c) The petitioner shall attach to his motion an affidavit setting out the time spent in the litigation and factual matters pertinent to the petition for

attorney's fees. The respondent may, by counter affidavit, controvert any of the factual matters contained in the petition and may assert any factual matters bearing on the award of attorney's fees.

(d) The 14-day period set forth in subsection (a) shall not apply to cases wherein the statute creating the right to attorney's fees also provides its own limitation period for filing such motions. (Adopted and effective September 1, 1982; amended January 2, 1990; amended November 10, 2009.)

CASE NOTES

Time Limitations.

Because the language "unless otherwise provided by statute" in Fed. R. Civ. P. 54(d) referred back to the 30-day rule found in 28 U.S.C.S. § 2412(d)(1)(B), the time limit in this rule could not supercede a statute that expressly allowed prevailing parties 30 days in which to file applications for fees and

expenses; thus, where judgment was entered in favor of a taxpayer on January 23, 2003, and the taxpayer's motion for attorney's fees was filed on February 20, 2003, the motion was timely. *O'Banion v. United States*, — F. Supp. 2d —, 2003 U.S. Dist. LEXIS 11578 (E.D. Ark. June 3, 2003).

Rule 56.1. Summary judgment motion.

In addition to the requirements set forth in Local Rule 7.2, the following requirements shall apply in the case of motions for summary judgment.

(a) Any party moving for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, shall annex to the notice of motion a separate, short and concise statement of the material facts as to which it contends there is no genuine dispute to be tried.

(b) If the non-moving party opposes the motion, it shall file, in addition to any response and brief, a separate, short and concise statement of the material facts as to which it contends a genuine dispute exists to be tried.

(c) All material facts set forth in the statement filed by the moving party pursuant to paragraph (a) shall be deemed admitted unless controverted by the statement filed by the non-moving party under paragraph (b).

(d) The time for filing a response and a reply is governed by Local Rule 7.2 (b). (Adopted and effective March 14, 1984; amended May 20, 2010; amended February 22, 2011.)

CASE NOTES

Admission.

United States was granted injunctive relief against two taxpayers under 26 U.S.C.S. § 7402(a) because the taxpayers admitted that liens, notes, and certificates were all fraudulent and were recorded by the taxpayers to harass employees and officers of the

United States, as well as to delay the enforcement of internal revenue laws. The taxpayer made the admission due to a failure to respond to the United States' motion for summary judgment. *United States v. Neal*, — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 7152 (W.D. Ark. Jan. 24, 2011).

Rule 58.2. Satisfaction of judgments.

(a) Satisfaction of a judgment shall be noted by the Clerk on the margin of the record of the civil judgment book upon the happening of any of the following:

(1) The filing with the Clerk of a written satisfaction of judgment executed by the judgment creditor or his attorney of record.

(2) The filing with the Clerk of a return to an execution by the United States Marshal showing the judgment collected by the Marshal.

(3) The payment of the judgment or the fine imposed into the Registry of the Court.

(b) A judgment creditor or his attorney of record may also note satisfaction of judgment on the margin of record of the civil judgment book. The Clerk shall attest such notation. (Adopted and effective May 1, 1980.)

Rule 67.1. Deposit of registry funds by the clerk in interest-bearing accounts.

(a) All funds deposited in the Registry of this Court, pursuant to 28 U.S.C. § 2041 shall be deposited with the Treasurer of the United States through the Federal Reserve Bank or a depository designated by him to receive the Registry funds. Thereafter the investment of any such funds in interest-bearing instruments in accordance with the following provisions shall be at the initiative of the interested party or parties through counsel of record. It is counsel's responsibility to see that the provisions of this rule are complied with.

(b) Pursuant to Rule 67, Fed.R.Civ.P, counsel shall apply to the judge to whom the case is assigned for an order directing the Clerk to accept the funds for deposit and to invest the funds in an interest-bearing instrument in a financial institution insured by the FDIC. The Order will include the following:

- (1) The amount to be invested;
- (2) The type of account or instrument in which funds are to be invested (i.e., certificate of deposit or treasury bills, etc.); and
- (3) The length of the term of investment; and
- (4) Wording which directs the Clerk to deduct from the income earned on the investment a fee, not exceeding that authorized by the Judicial Conference of the United States and set by the Director of the Administrative Office.

(c) Whenever an Order is entered directing the investment of funds deposited in the Registry of the Court, it shall be the responsibility of counsel to cause a copy of such Order to be served personally upon the Clerk of the Court, or on the Chief Deputy Clerk, in the absence of the Clerk, AND on the Financial Deputy.

(d) The Clerk shall take all reasonable steps to assure that the funds are invested as quickly as the business of the Clerk's office will allow.

(e) The party obtaining the Order directing the investment of funds at interest will verify that the Clerk has invested the funds as directed.

(f) Failure of the party to personally serve a copy of the Order to invest funds as specified in this Rule, or failure to verify that the funds have been invested pursuant to this Rule, shall release the Clerk and any of his deputies from any liability for loss of interest which could have been earned on the funds.

(g) Early withdrawal of funds from interest-bearing instruments which result in a loss of interest penalty will be the sole responsibility of counsel making the request.

(h) Under no circumstances shall counsel purchase an interest-bearing instrument in his own name or in the name of the Clerk for subsequent deposit into the Registry. This is the sole responsibility of the Clerk of the Court or his designated deputy.

(i) Interest-bearing instruments shall not, under any circumstances, be endorsed by the Clerk of the Court to a payee. Prior to disbursement,

interest-bearing instruments must be converted to a cashier's check and deposited with the Treasurer of the United States for subsequent payment.

(j) Funds deposited in the Registry Account by personal or corporate check, whether or not the funds are to be invested in an interest-bearing account, shall be received subject to collection. Said monies shall not be paid from the Registry for a period of three (3) weeks after receipt therefor.

(k) Pursuant to 28 U.S.C. § 2042, disbursement of funds held in the Registry of the Court will be made only upon Order of the Court.

(l) The Clerk shall be allowed seven (7) business days following receipt of an order for disbursement of funds from the Registry Account, subject to the above paragraph (j).

(m) Pursuant to notice published in the October 24, 1990, edition of the Federal Register, the Clerk of the district court is required to assess a fee for handling funds deposited with the court in criminal and non-criminal proceedings held in interest-bearing accounts. The fee will be a charge of 10% of the income earned regardless of the nature of the case underlying the investment. The fee is effective with deposit of funds received on or after December 1, 1990.

The Clerks of the United States District Court for the Eastern and Western Districts of Arkansas shall deduct the 10% fee on interest earned prior to any distribution without further order of the Court for subsequent deposit to the Treasurer of the United States. (Adopted and effective July 14, 1986; amended March 26, 1992; amended November 10, 2009.)

Rule 71A.1. Land condemnation proceedings.

(a) For each trial unit (that is, an ownership or economic unit for which just compensation is required by substantive law to be separately determined in a single sum), there shall be a separate civil action. The condemning authority shall make the initial determination of the identity of such trial units but this determination shall be subject to revision by the Court as the interests of justice and the convenient administration of this business of the Court may require. A single declaration of taking, complaint, or notice of condemnation may include one or more tracts, trial units or ownerships. Where a complaint, declaration of taking and notice of condemnation including more than one trial unit are filed, the Clerk shall establish a civil action file for each trial unit and shall file the initial pleadings in the lowest numbered civil action file. Higher numbered civil action files shall bear a notation indicating the place where such documents are filed. Any pleading, motion, order, or other document filed at the time of or after the filing of the complaint, notice of condemnation or declaration of taking which affects all trial units may be filed by the Clerk in such file only, but the condemning authority may, and at the direction of the Court shall, furnish to the Clerk additional copies for filing in the other civil action files. Condemnation civil action files shall be numbered consecutively in the same sequence with other civil actions. The complaint and notice of condemnation shall indicate, by tabulation or otherwise, what lands are included in each civil action. When a condemnation complaint, declaration of taking and notice of condemnation involve more than one civil action, all of the civil action numbers involved shall be included in the captions of those documents.

(b) At the request of the attorney for the condemning authority, upon the filing of a declaration of taking, the Clerk shall forthwith assign civil action numbers as may be required for each trial unit, and the condemning

authority shall proceed to file the complaint, notice of condemnation, and other initial pleadings expeditiously and in any event within seven days.

(c) Pleadings and other documents in a condemnation case need not be typed but may be produced by any process which produces documents substantially equivalent in size and legibility to typewriter ribbon copy prepared in conformity with Rule 5.5 of these rules. When a pleading so produced is filed, the original shall be signed by the attorney for the party filing it and the signed original shall be labeled as such on its face in some conspicuous manner.

(d) When a condemnation case involving more than one civil action is filed, each civil action shall be assigned randomly to a judge in the manner of assignment of ordinary civil actions; but any motion affecting all or several of such civil actions may be presented to the judge to whom is assigned the first of such civil actions affected, or in the absence of that judge to the judge to whom the second is assigned, and so on until a judge is available.

(e) Civil actions in condemnation cases may be set for trial of the issue of just compensation, or for hearings or trials of other issues, singly or in groups as may be convenient to the Court and parties. When set in groups, no consolidation is required, but the Court shall give such instructions, require such forms or numbers of verdicts, and make such findings and orders as shall preserve the rights of all the parties under substantive law. (Adopted and effective May 1, 1980; revised effective August 3, 1981; amended November 10, 2009.)

Rule 72.1. United States Magistrate Judges.

The duties and jurisdiction of United States Magistrate Judges shall be as provided for in 28 U.S.C. Sec. 636 and in Rules 5 and 5.1 of the Federal Rules of Criminal Procedure.

I. MISDEMEANOR JURISDICTION

Under the conditions required by law, the full-time Magistrate Judges are designated to try persons accused of, and to sentence persons convicted of, misdemeanors as defined by U.S.C. Sec. 3401. They are authorized to direct the United States Probation Office to conduct presentence investigations, render reports, and provide other necessary services. The Clerk shall automatically refer all misdemeanor cases that are initiated by information or indictment or are transferred to this district under Rule 20 of the Federal Rules of Criminal Procedure to a Magistrate Judge for plea and arraignment. If the defendant in such cases consents to the Magistrate Judge's jurisdiction, further proceedings shall be conducted before the Magistrate Judge. All part-time Magistrate Judges in both districts are also designated to try misdemeanor cases. In the Eastern District, the part-time Magistrate Judges shall exercise this jurisdiction when specifically referred a case by a District Judge or a full-time Magistrate Judge.

II. FORFEITURE OF COLLATERAL

The full-time Magistrate Judge shall oversee the Forfeiture of Collateral system. (Also, see a general order of the Court of each district for more details.)

III. COMMITMENT TO ANOTHER DISTRICT

The Magistrate Judge shall conduct proceedings pursuant to Federal Rules of Criminal Procedure 40.

IV. CRIMINAL PRETRIAL

A Magistrate Judge may conduct post-indictment arraignments. In felony cases, he shall accept not guilty pleas and refer pleas of guilty to a District Judge, or if no District Judge is immediately available, the Magistrate Judge shall enter a not guilty plea for the defendant and schedule a time for the defendant to appear before a District Judge and enter a change of plea.

V. SUBPOENAS AND WRITS

A Magistrate Judge may issue subpoenas, writs of habeas corpus ad testificandum or ad prosequendum or other orders necessary to obtain the presence of parties or witnesses or evidence needed for court proceedings, either civil or criminal.

VI. MOTIONS TO DISMISS

A Magistrate Judge may hear and decide motions by the government to dismiss an indictment, information or complaint without prejudice to further proceedings.

VII. REFERENCE OF NON-DISPOSITIVE MATTERS

A. Reference

When designated by a District Judge, and as limited by 28 U.S.C. Sec. 636(b)(1)(A), a Magistrate Judge may hear and determine any pretrial matters pending before the Court, including, but not limited to, procedural and discovery motions, pretrial conferences, omnibus hearings, docket calls, settlement conferences, and related proceedings.

B. Appeal

In all matters delegated under authority of 28 U.S.C. Sec. 636(b)(1)(A), a Magistrate Judge's decision is final and binding and is subject only to a right of appeal to the District Judge to whom the case has been assigned. A party may appeal the Magistrate Judge's ruling by filing a motion within fourteen (14) days of the Magistrate Judge's decision unless a shorter period is set by the District Judge or Magistrate Judge. Copies shall be served on all other parties and the Magistrate Judge from whom the appeal is taken. The motion shall specifically state the rulings excepted to and the basis for the exceptions. The Court may reconsider any matter sua sponte. The District Judge shall affirm the Magistrate Judge's findings unless he finds them to be clearly erroneous or contrary to law. In all matters referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(c) (consent jurisdiction), an aggrieved party may appeal only to the Court of Appeals in the same manner as on appeal from any other judgment of a district court.

VIII. DISPOSITIVE MATTERS

A. Reference — General

A District Judge may designate a Magistrate Judge to conduct hearings, including evidentiary hearings, and to submit proposed findings of fact and recommendations for the resolution of any dispositive matters, including, but not limited to, the following:

1. Motions by the defendant to dismiss or quash an indictment or information;
2. Motions to suppress evidence;
3. Applications to revoke probation, including the conduct of the "final" probation revocation hearing;
4. Motions for temporary restraining orders and preliminary injunctions;
5. Motions to dismiss for failure to state a claim upon which relief may be granted;

6. Motions to dismiss an action and to review default judgment;
7. Motions to dismiss or to permit the maintenance of a class-action;
8. Motions for judgment on the pleadings or for summary judgment;
9. Cases involving the granting of benefits to claimants under the Social Security Act and the "black lung" benefit laws;
10. Cases involving the adjudication by the Civil Service Commission of adverse employee actions, retirement eligibility and benefits questions; and the rights of employees in situations such as reductions in force.

B. Reference — Prisoner Petitions

A Magistrate Judge shall have the following responsibilities with regard to prisoner petitions:

1. Review of prisoner correspondence and petitions concerning 28 U.S.C. Sec. 2254 and 42 U.S.C. Sec. 1983 matters;
2. Review of prisoner correspondence and petitions concerning conditions of confinement which are submitted by federal prisoners;
3. Preparation and distribution of forms required by the Rules governing Sec. 2254 Cases (28 U.S.C. Sec. 2254);
4. Entry of orders authorizing the petitioner to proceed in forma pauperis without the prepayment of costs or fees;
5. Issuance of all necessary orders to answer or to show cause or any other necessary orders or writs to obtain a complete record;
6. Taking of depositions, conducting pretrial conferences, and conducting evidentiary hearings or other necessary proceedings in order to obtain a complete record.

C. Objection

When a Magistrate Judge files proposed findings or recommendations with the Court, he shall mail a copy to all parties. Within fourteen (14) days after being served with a copy, any party may serve and file written objections to such proposed findings, recommendations or order. The District Judge must make a de novo determination of any matters which have been specifically objected to by the litigants, but this does not necessarily require the Judge to conduct a hearing on contested issues. In some instances, it may be necessary for the District Judge to modify or reject the findings of the Magistrate Judge, to take additional evidence, recall witnesses, or recommit the matter to the Magistrate Judge for further proceedings.

D. Statement of Necessity

A party objecting to the Magistrate Judge's proposed findings and recommendations who desires to submit new, different, or additional evidence and to have a hearing for this purpose before the District Judge will file a "statement of necessity" at the time he files his written objections, and which shall state:

1. why the record made before the Magistrate Judge is inadequate;
2. why the evidence to be proffered (if such a hearing is granted) was not offered at the hearing before the Magistrate Judge; and
3. the details of any testimony desired to be introduced in the form of an offer of proof, and a copy, or the original, of any documentary or other non-testimonial evidence desired to be introduced.

From this submission, the District Judge shall determine the necessity for an additional evidentiary hearing, either before the Magistrate Judge or before the District Judge.

IX. MASTER REFERENCES

When designated by a District Judge, a Magistrate Judge may:

A. serve as a special master in accordance with the provisions of Rule 53 of the Federal Rules of Civil Procedure, or, upon consent of the parties, without regard to the provisions of Rule 53. He may also hear testimony and submit a report and findings on complicated issues in jury and non-jury cases;

B. conduct evidentiary hearings and prepare findings in employment discrimination cases as a master under 42 U.S.C. Sec. 2000(e)(5); and

C. conduct hearings and resolve specific issues in patent, antitrust and other complex cases where there are a great many issues, claims and documents, or in multiple disaster and class-action cases where there are numerous claimants and diverse claims.

X. CIVIL CONSENT JURISDICTION

A. Special Designation

The full-time Magistrate Judges of both districts are specially designated by the District Court to conduct any or all proceedings in jury or non-jury civil matters upon the consent of the parties.

B. Reference

(1) *Notice.* The Clerk shall give the plaintiff notice of the Magistrate Judge's consent jurisdiction, in a form approved by the Court, when a civil suit is filed. The Clerk shall also attach the same notice to the summons for service on the defendant.

(2) *Consent.* Any party may obtain a "Consent to Magistrate Judge's Jurisdiction" form from the Clerk's Office. The Clerk shall furnish the party with Consent Form A, which shall provide that any appeal in the case shall be taken directly to the Circuit Court of Appeals.

(3) *Transfer.* Once the completed forms have been returned to the Clerk, he shall then draw by lot the name of the Magistrate Judge and forward the Consent forms for final approval to the District Judge to whom the case is assigned. When the District Judge has approved the transfer and returned the Consent forms to the Clerk's Office for filing, the Clerk shall forward a copy of the Consent forms to the Magistrate Judge to whom the case is assigned. The Clerk shall also indicate on the file that the case has been assigned to the Magistrate Judge.

C. Appeal

Appeal to the Court of Appeals. The final judgment, although ordered by the Magistrate Judge, is deemed a final judgment of the District Court and will be entered by the Clerk under Rule 58 F.R.C.P. Any appeal shall be taken to the Court of Appeals in the same manner as an appeal from any other judgment of the District Court.

XI. OTHER REVIEWABLE MATTERS

Rulings, orders, or other actions by a Magistrate Judge in the District, review of which is not otherwise specifically provided for by law or these rules, shall, nevertheless, be subject to review by the District Court as follows:

A. Any party may file and serve, not later than fourteen (14) days thereafter, an application for review of the Magistrate Judge's action by the District Judge having jurisdiction. Copies of such application shall be served promptly upon the parties, the District Judge, and the Magistrate Judge.

B. After conducting whatever further proceedings he or she deems appropriate, the District Judge may adopt or reject, in whole or in part, the action taken by the Magistrate Judge, or take such other action he or she

deems appropriate. (Divisions I through X adopted and effective May 1, 1980; division XI adopted and effective June 26, 1981; division VIII(B)(6) adopted and effective October 1, 1982; division X revised and effective January 1-2, 1988; amended January 2, 1990; division VIII(B)(1) revised and approved April 1, 1999; amended November 10, 2009.)

(Form A)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARKANSAS
DIVISION

CONSENT TO PROCEED BEFORE A
UNITED STATES MAGISTRATE JUDGE
(Appeal to the Court of Appeals)

In the Matter of

V. CASE NO.

The undersigned parties (or counsel, if so authorized) to the above-captioned proceeding are fully aware of the right to proceed before a judge of the district court and do hereby consent to the reference of the matter to a United States Magistrate Judge, in accordance with Section 636(c) of Title 28, United States Code, and the Rules of this Court.

The Magistrate Judge shall be empowered to conduct any or all further proceedings and to order the disposition of the matter and the entry of an appropriate judgment. An appeal from the judgment shall be taken to the United States Court of Appeals for this judicial circuit.

PLAINTIFFS	DATE	DEFENDANTS	DATE

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to _____, United States Magistrate Judge, for the conduct of further proceedings and the entry of judgment in accordance with the foregoing consent.

(Date)	(United States District Judge)
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(Form B)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARKANSAS
DIVISION

CONSENT TO PROCEED BEFORE A
A UNITED STATES MAGISTRATE JUDGE
(Appeal to the District Judge)

In the Matter of

V. CASE NO.

The undersigned parties (or counsel, if so authorized) to the above-captioned proceeding are fully aware of the right to proceed before a judge of the district court and do hereby consent to the reference of the matter to a United States Magistrate Judge, in accordance with Section 636(c) of Title 28, United States Code, and the Rules of this Court.

The Magistrate Judge shall be empowered to conduct any or all further proceedings and to order the disposition of the matter and the entry of an appropriate judgment. An appeal from the judgment shall be taken to a judge of this United States District Court.

PLAINTIFFS	DATE	DEFENDANTS	DATE

ORDER OF REFERENCE

IT IS HEREBY ORDERED that the above-captioned matter be referred to _____, United States Magistrate
(drawn by Clerk of Court)
Judge, for the conduct of further proceedings and the entry of judgment in accordance with the foregoing consent.

(Date) (United States District Judge)

**NOTICE OF RIGHT TO CONSENT TO DISPOSITION
OF A CIVIL CASE BY A UNITED STATES
MAGISTRATE JUDGE**

In accordance with the provisions of 28 U.S.C. Sec. 636(c) you are hereby notified that upon the consent of all the parties in a civil case, a United States Magistrate Judge of this District Court may be authorized to conduct any or all proceedings, including trial of the case and entry of a final judgment. Copies of appropriate consent forms are available from the Clerk of the Court. Consent Form A shall provide for any appeal of the case to be taken directly to the Circuit Court of Appeals and Consent Form B shall provide for any appeal in the case to be taken to the District Court.

You should be aware that your decision to consent, or not to consent, to the disposition of your case before a United States Magistrate Judge is entirely voluntary and should be communicated to the Clerk of the District Court.

In the event all parties consent to disposition by a Magistrate Judge, Magistrate Judge _____ will handle this case.

**CONSENT BY THE PARTIES DOES NOT AFFECT YOUR
RIGHT TO A JURY TRIAL.**

(Revised and effective January 1-2, 1988; amended January 2, 1990.)

CASE NOTES

Other Reviewable Matters.

If an application for review is untimely, the U.S. District Court for the Eastern District of Arkansas may dismiss it, however, nothing in subdivision (XI) of this rule precludes the

district court from adopting or rejecting the magistrate judge's order or taking other appropriate action, regardless of the timeliness of any application for review. United States v. Meyer, 439 F.3d 855 (8th Cir. 2006).

Rule 77.1. Location and office hours of clerks' offices, and designation of filing offices.

EASTERN DISTRICT OF ARKANSAS

<u>Division</u>	<u>Court Held</u>	<u>Office Hours</u>	<u>Filing Office</u>	<u>Clerk's Telephone</u>
Eastern	Helena	Unstaffed	600 West Capitol Ave, Room A149 Little Rock, AR 72201	870-338-6321
Western	Little Rock	8:00 - 5:00	600 West Capitol Ave, Room A149 Little Rock, AR 72201	501-324-5351
Northern	Batesville	Unstaffed	600 West Capitol Ave, Room A149 Little Rock, AR 72201	870-793-4330
Pine Bluff	Pine Bluff*	8:00 - Noon 1:00 - 5:00	100 East 8th St., Room 3103 Pine Bluff, AR 71601-8307	870-536-1190
Jonesboro	Jonesboro*	8:00 - Noon 1:00 - 5:00	615 South Main St., Room 312 Jonesboro, AR 72401	870-972-4610

WESTERN DISTRICT OF ARKANSAS

<u>Division</u>	<u>Court Held</u>	<u>Office Hours</u>	<u>Filing Office</u>	<u>Clerk's Telephone</u>
Fort Smith	Fort Smith	8:00 - 5:00	P.O. Box 1547 Fort Smith, AR 72902-1547	479-783-6833
Harrison	Harrison	Unstaffed	35 East Mountain Room, 510 Fayetteville, AR 72701-5354	479-521-6980

Texarkana	Texarkana	8:00 - Noon	500 North State Line Ave., Room 302	870-773-3381
		12:30 - 4:30	Texarkana, AR 71854-5961	
El Dorado	El Dorado	8:00 - Noon	101 South Jackson Ave., Room 205	870-862-1202
		12:30 - 4:30	El Dorado, AR 71730-6133	
Fayetteville	Fayetteville	8:00 - 5:00	35 East Mountain Room 510	479-521-6980
			Fayetteville, AR 72701-5354	
Hot Springs	Hot Springs	8:00 - Noon	100 Reserve St., Room 347	501-623-6411
		12:30 - 4:30	Hot Springs, AR 71901-4141	

*All Clerks' offices are closed for legal holidays (see Fed.R.Civ.P.77(c)). The offices noted by an asterisk may be temporarily closed for vacations or due to unexpected absences.

(Amended July 1, 1988; amended effective April 15, 1989; amended November 10, 2009; amended August 5, 2010.)

Rule 79.1. Removal of files or withdrawal of papers and exhibits.

(a) *Temporary Removal.* No record or material may be removed from the Clerk's office without written leave of the Court previously obtained except by a master, auditor, or other person to whom the record or material has been referred. Any person withdrawing any record or material shall give to the Clerk at the time of withdrawal a receipt specifying the items withdrawn, the date of withdrawal and the date the item is to be returned.

(b) *Permanent Withdrawal.* The Court may by prior order permit a document or exhibit to be permanently withdrawn from the file maintained by the Clerk, but the party requesting the same shall furnish the Clerk a receipt and an appropriate replacement for the original. The replacement shall then be filed in lieu of the withdrawn original.

(c) *Judge's Files.* In no event shall the Judge's files be removed or examined without order of the Court.

(d) *Custody of Exhibits.*

(1) All exhibits offered in evidence, whether admitted or excluded, shall be held in the custody of the Clerk until the trial of the cause is completed. Exhibits offered at trial shall be marked for identification by the Clerk. During the course of the trial, the Court may permit counsel to withdraw or substitute exhibits. At the end of the trial the Clerk or the courtroom deputy acting for the Clerk is directed to return to respective counsel all exhibits introduced during the trial, and to obtain a receipt therefor from counsel. The exhibits are to be retained by counsel until the time for filing notice of appeal has expired.

(2) Upon the filing of a notice of appeal, or at any other time, counsel shall, upon request by the Clerk, return the exhibits to the Clerk within 24 hours after such request is made, Sensitive exhibits such as firearms, explosive devices, untaxed whiskey, counterfeit money, and narcotics are excluded from this portion of the order pertaining to returning exhibits to the Clerk. During the trial of a cause the sensitive exhibits named above shall be retained by the United States Attorney or the representative of the agency of the United States involved in that particular cause.

(3) Upon the return of a not guilty verdict in a case in which a sensitive exhibit has been introduced and it is questionable whether the exhibit should be returned to the defendant, the Clerk is directed to take custody of the exhibit pending an order from the Court for its disposition.

(4) In the event of a mistrial, it shall be the responsibility of counsel to preserve and protect the exhibits which will be needed for the retrial.

(5) If a case is taken under advisement by the Court and the Court is of the opinion that the exhibits will be needed in preparing its findings of fact and conclusions of law, or in the writing of its memorandum opinion, the Court shall then direct that the exhibits be retained by the courtroom deputy. (Subsections (a) through (c) adopted and effective May 1, 1980; subsection (d) adopted and effective November 22, 1982.)

Rule 83.1. United States bankruptcy judges.

I. REFERENCES

All cases and proceedings arising under Title 11 of the United States Code or arising in or related to a case under Title 11, brought pursuant to 28 U.S.C. § 1334, § 1412, or § 1452, except personal injury or wrongful death tort claims, are referred to the bankruptcy judges for this district as provided in 28 U.S.C. § 157(a).

II. PROCEEDINGS

(a) The bankruptcy judge shall hear and determine all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11, which are referred under this Rule and shall enter appropriate orders and judgments.

(b)) If the bankruptcy judge determines that a matter is a related proceeding as provided in 28 U.S.C. § 157(c)(1), the bankruptcy judge shall hear all proceedings therein and submit proposed findings of fact and conclusions of law for determination and entry of any final order or judgment by a district judge, unless the parties consent to the entry of a final order by the bankruptcy judge pursuant to Bankruptcy Rule 7012(b).

(c) All papers in bankruptcy cases and proceedings which are referred under this Rule shall be filed with the Bankruptcy Clerk for this district. Motions to withdraw a reference filed with the Bankruptcy Clerk shall be forwarded to the Clerk of the District Court for a determination by the District Court pursuant to Bankruptcy Rule 5011.

(d) *Bankruptcy Appeals.* Bankruptcy appeals to the district court are governed by the bankruptcy rules, particularly Bankruptcy Rules 8001 through 8019. Pursuant to the authority granted by Rule 8018, the rules governing appeals to district court are supplemented as follows:

A. The Bankruptcy Court is authorized to dismiss an appeal filed after the time provided by the applicable rules and any appeal in which the appellant has failed to file a designation of the items for the record, or the transcript designated for inclusion in the record or a statement of the issues as required by the applicable rules. Bankruptcy Court orders entered under this subsection shall be reviewed by the district court on motion filed within fourteen days after entry of the order sought to be reviewed. (Revised and effective November 1, 1996; amended July 1, 1988; amended November 10, 2009.)

CASE NOTES

Jurisdiction.

Where chapter 13 debtors brought post-confirmation claims against a secured creditor for alleged misapplication of mortgage payments, only claims brought under the

Bankruptcy Code were within the court's subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), 28 U.S.C.S. 1334, and this rule. *Moffitt v. America's Servicing Co.* (In re Moffitt), 406 B.R. 825 (Bankr. E.D. Ark. 2009).

Rule 83.2. Photographing, broadcasting, televising, and recording in courtroom and environs.

(a) The taking of photographs, the recording by any means other than the official court reporter or the radio or television broadcasting (or making of audio or video tapes) in any courtroom or its environs, utilized by either United States District Court in Arkansas during the progress of or in connection with any judicial proceedings, including proceedings before a United States Magistrate Judge, is PROHIBITED, except as hereinafter provided, and regardless whether such hearing or proceeding takes place on public or private property or in the office or chambers of a judge or magistrate judge or otherwise.

(b) The taking of photographs, still or motion pictures, and audio and video tapes, of ceremonies and interviews, including administration of oaths of applicants for citizenship and to executive and judicial officers, may be permitted with leave of the Court or the officer in charge thereof; provided that the ceremonies and interviews are not connected with any judicial proceedings. "Judicial proceedings", as used herein, shall include all judicial proceedings, whether civil or criminal, and whether pending, on appeal, or terminated.

(c) "Environs", as used in this Rule, shall include the part of any Federal Building with the District set apart for the United States District Court and its facilities, including chambers of the Court, other facilities of court officials and adjacent hallways.

(d) *Exception for Media Representatives to make Audio Tapes.* Duly identified and authorized representatives of the print, radio, and television media may unobtrusively make audio tapes during trials and hearings in open court solely for the purpose of assuring the accuracy of reports. The only official record of such proceedings shall continue to be that made by the official court reporter and the Clerk in accordance with law. Proper prior arrangements for the making of such audio tape recordings shall be made where necessary to avoid any interruption or interference with such proceedings. Audio tape recordings made pursuant to this exception may not be broadcast or rebroadcast to the public, transferred or sold, or used as such for commercial purposes. (Adopted and effective May 1, 1980; subparagraph (d) adopted and effective September 1, 1986.)

Rule 83.3. Weapons in courtrooms.

The possession of firearms or other weapons in any federal courtroom in the state of Arkansas is prohibited. This prohibition shall apply to all federal courtrooms or places where federal court proceedings are conducted wherever located and, including without limitation, all federal district courtrooms, U. S. Magistrate Judges' courtrooms, and U. S. Bankruptcy courtrooms. PROVIDED HOWEVER this prohibition shall not apply to the U. S. Marshal, any deputy U. S. Marshal, or any state or federal law enforcement officer or guard specifically excepted by the U. S. Marshal from the provisions of this rule. And PROVIDED FURTHER, this rule shall not apply to federal law enforcement officers having the custody of a person or persons who must come before the Court for an initial appearance. And PROVIDED FURTHER, any federal judge, bankruptcy judge, or U. S. magistrate judge

may make such further exceptions to this rule with respect to matters coming before him or her as said judge may determine appropriate. (Effective April 15, 1989.)

Rule 83.4. Mandate of an appellate court.

When a cause is remanded by an appellate court and further proceedings are not required, the order of the appellate court shall be the order of the District Court and shall be entered by the Clerk. (Adopted and effective May 1, 1980.)

Rule 83.5. Attorneys.

(a) *Bar of the Court.* The Bar of the Arkansas district court shall consist of those persons admitted to practice in either district.

(b) *Eligibility.*

1. All persons who are on the roll of attorneys for either district of Arkansas upon the effective date of these Rules shall continue to be enrolled.

2. Any person is eligible for enrollment who is licensed to practice in the state of his residence, and, in the case of a nonresident of Arkansas, has previously been authorized to practice in any United States District Court.

3. Any attorney who is enrolled in the United States District Court for either district of Arkansas is automatically enrolled in the other district.

(c) *Procedure for Admission.*

1. Each applicant for admission to the Bar of this Court shall file with the Clerk a written petition setting forth his residence and office address and telephone numbers, his legal education, any criminal record other than traffic offenses the applicant may have, and the courts to which he has been admitted to practice. The petition shall be accompanied by a current certificate of good standing from the clerk of the highest court in the state where the applicant principally practices law.

2. The Clerk shall examine the petition and accompanying certificates and, if these comply with this Rule, the petition shall be presented to a judge of these courts who shall determine its sufficiency. If approved, the applicant shall make suitable arrangements thereafter with the Clerk for his appearance and admission.

(d) *Special or Limited Appearance (Pro Hac Vice).* Any attorney who is a member in good standing of the Bar of any United States District Court, or of the highest court of any state or territory or insular possession of the United States, but is not admitted to practice in the District Courts in Arkansas, may, upon oral or written application, be permitted to appear and participate in a particular case.

The application shall designate a member of the Bar of these Courts who maintains an office in Arkansas for the practice of law with whom the court and opposing counsel may readily communicate regarding the conduct of the case. There shall also be filed with such application the address and telephone number of the named designee.

Notwithstanding these provisions, the Court, upon written motion, may waive these requirements of this designation and permit the non-enrolled attorney to proceed without designating local counsel, for the limited

purposes of the pending litigation. In support of the motion, non-enrolled counsel must affirm to these Local Rules and to the jurisdiction of the Court in matters of discipline.

Appearances under this provision are limited and may be withdrawn by the presiding judge. Pleadings tendered to the Clerk for filing by an attorney who is not admitted to practice shall be accepted and filed by the Clerk and the Clerk shall call this Rule to the attention of the attorney. After the rule has been called to the attention of an attorney and a period of 30 days has elapsed, any additional pleadings tendered by the attorney shall not be accepted and filed by the Clerk until the requirements of this Rule are met. The Rule shall not apply to any attorney for the United States appearing in his official capacity.

(e) *Disbarment and Discipline.* All persons enrolled as attorneys in either of these courts or appearing pro hac vice under the provisions of Rule 83.5(d), shall be subject to the Uniform Federal Rules of Disciplinary Enforcement, which are hereby adopted and included in the Appendix to these rules.

(f) *Withdrawal.* No attorney shall withdraw from an action or proceeding except by leave of Court after reasonable notice has been given to the client and opposing counsel. (Adopted and effective May 1, 1980; amended effective January 2, 1990; amended December 3, 2002; amended May 20, 2010; amended January 9, 2012.)

Rule 83.6. Assessment for out-of-pocket expenses.

Rule XI(A) of the Appendix to these rules is hereby amended as follows:

(1) The \$5.00 assessment fee authorized in Rule XI(A) may be used to establish a "Library Fund" to reimburse attorneys for out-of-pocket expenses when the attorney has been appointed under Title 28, United States Code, Section 1915. These funds shall be used to pay only those expenses where no funds are available from other sources to cover the out-of-pocket expenses.

(2) It shall be the sole discretion of the judges if the fund collected shall be deposited to the "Appendix Rule XI(A) Fund" or to the "Library Fund." There will be a separate "Library Fund" maintained for the Eastern and Western Districts of Arkansas. Funds will be divided between the districts following each assessment. The manner for deciding the division of funds will be based upon the residence of attorneys in the court's database. Additional funds may be transferred from one district to another based upon the demonstration of need. Those fees which have been heretofore collected pursuant to Rule XI(A) of the Appendix have been deposited to the "Appendix Rule XI(A) Fund" and shall remain so deposited in an interest bearing account, to be used exclusively for the payment of costs incurred in attorney discipline matters.

(3) Until otherwise ordered by the Court, the Clerk for the Eastern District of Arkansas shall collect the \$5.00 assessment fee from attorneys and deposit it into an interest bearing checking account for the reimbursement of unusual expenses of appointed attorneys in actions where counsel was appointed under 28 U.S.C. Sec. 1915, or for transfer to the "Library Fund" for the Western District of Arkansas.

(4) *Custodian.*

The custodian of the "Appendix Rule XI(A) Fund" shall be the Clerk for the Eastern District of Arkansas. The custodians of the "Library Fund" shall

be the Clerk for each respective district, whose responsibilities shall be those set out in the Accounting Standards established by these courts. A copy of the Accounting Standards shall be maintained on file in the Clerk's office in each district.

(5) *Application and disbursement.*

(a) *Application.* Application for disbursement from this fund shall be made in accordance with the policies and guidelines (which is Exhibit A to this Rule) established by these courts. The application will contain the information prescribed in paragraph 3 of policy guidelines.

(b) *Disbursement.* The custodians of the "Library Fund" shall make disbursement from the respective Funds in accordance with the policies and guidelines (Exhibit A) established by these courts. Disbursement shall be made only upon order of the proper court in the form attached hereto as Exhibit B.

(6) All other provisions pertaining to the collection of this fee pursuant to Rule XI(A) of the Appendix are made applicable to the collection of the fee for the "Library Fund."

(7) *Criteria for other uses for the fund.*

When the "Library Fund" or the "Appendix Rule XI(A) Fund" exceeds \$50,000.00, the portion in each fund in excess of that figure may be used, to the extent specifically authorized by the Court for the advancement of the courts of the United States, the legal profession, jurisprudence, or other aspects of the systems of justice in the United States. Upon the approval of a majority of the judges from the district holding the funds, an order may be entered on behalf of the Courts by the Chief District Judge directing the Clerk of Court to disburse such excess funds for such purposes.

**EXHIBIT A
TO
LOCAL RULE 83.6**

**REIMBURSEMENT OF OUT-OF-POCKET EXPENSES OF
APPOINTED COUNSEL**

POLICY GUIDELINES

This Court has determined that monies derived from the annual fees paid by attorneys admitted to practice before this Court may be used to reimburse attorneys appointed pursuant to 28 U.S.C. Sec. 1915 for out-of-pocket expenses and to pay any court-appointed experts when necessary. With respect to these purposes, the following guidelines are established:

(1) The Clerk of Court for each respective district shall monitor the fund and make a written report of the use of the fund and the fund balance to the Judges and Magistrate Judges of their district by the fourteenth day in each month.

(2) Before an attorney expends an amount above \$500.00, for which that attorney intends to seek reimbursement from the fund, written approval must be obtained from a District Court Judge or a Magistrate Judge.

(3) Before any single expenditure from the fund in excess of \$500.00 is authorized, or approval of a request by an attorney to expend in excess of \$500.00, the District Court Judge or Magistrate Judge shall inquire of the Clerk of Court for each respective district as to the impact of that expenditure on the fund.

(4) All requests by attorneys for disbursements or requests for approval of expenditures shall be by written application, containing the following information:

- (a) The date of the application;
- (b) The caption of the cause of action;
- (c) The name and address of the attorney requesting the disbursement or approval of expenditure;
- (d) A detailed itemization of all costs and expenses for which the disbursement or expenditure is requested; and
- (e) A brief explanation of how the requested disbursement or expenditure complies with the guidelines and policies established by the Court for disbursements from the fund.

(5) All disbursements, pursuant to requests by attorneys, from the fund shall be made only by order of a United States District Judge or a United States Magistrate Judge in the form attached as Exhibit B.
(Revised and effective February 22, 1994; revised and effective April 30, 2007; amended November 10, 2009.)

**EXHIBIT B
TO
LOCAL RULE 83.6
IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

	Plaintiff)	
V.)	
	Defendant)	Case No. _____

ORDER

Pending before the Court is the Application of _____ [Date] by _____ [Attorney] _____ or the reimbursement of out-of-pocket expenses. Having considered the application pursuant to the guidelines and policies of the Library Fund, the Court orders that the Clerk of the Court disburse money from the Library Fund in the amount of _____ (\$_____) and distribute it to the named applicant. A copy of this Order, together with the application, shall be placed in the Library Fund file maintained by the Clerk of the Court.

IT IS SO ORDERED this _____ day of _____, 20____.

UNITED STATES DISTRICT JUDGE OR
UNITED STATES MAGISTRATE JUDGE

(Revised and effective January 1-2, 1988; revised and effective April 30, 2007.)

Rule 83.7. Appointment of counsel.

In those civil cases in which the Court deems it necessary to appoint counsel to represent a party proceeding in forma pauperis (see 28 U.S.C. § 1915), such appointment shall be accomplished by random selection from a list of all actively practicing private attorneys enrolled in the District in which the case is pending. Prospective appointees will be informed by telephone of their selection, when possible, so as to avoid appointment of an attorney who is not actively engaged in the private practice of law. However, in the event an enrolled attorney not actively engaged in the private practice of law is appointed, such attorney may request leave to withdraw within twenty-one (21) days of such appointment. The Court will depart from this random appointment procedure when the extraordinary nature or exigency of the circumstances suggests that an alternate means of selection is necessary. These appointments shall be mandatory.

The original attorney appointed may arrange for substitute counsel to appear in behalf of the party, but such substitution must be made in writing and filed with the Court not later than twenty-one (21) days after the entry of the original appointment order. This substitution will not relieve the substituted counsel from serving as appointed counsel in any subsequent case when he/she would otherwise be selected at random.

Upon written application filed within twenty-one (21) days of the original appointment order, an attorney may request leave of the Court to withdraw if he/she represents (1) that he/she has actively participated in furnishing pro bono legal services (e.g., membership in a pro bono legal organization); and (2) that he/she has, in the last twelve (12) months, actually represented a pro bono client(s) in either (a) litigation, or (b) a non-litigation matter which the attorney can certify required the expenditure of a minimum of twenty (20) hours of time. If, after interviewing the client, investigating the facts, and researching the applicable law, an appointed attorney is convinced that the party's legal position is non-meritorious, the appointed attorney may petition the Court for leave to withdraw. Such petition to withdraw must be filed within sixty (60) days of the appointment order. If the attorney is allowed to withdraw, his/her name may be restored to the list of enrolled attorneys subject to future appointment.

For good cause shown (e.g., geographic, time, or expertise factors), an appointed attorney may request the Court to select an additional attorney to serve as co-counsel in an investigative or trial capacity.

In the event attorneys enrolled in the Eastern and Western Districts of Arkansas desire to volunteer their services prior to receiving notification of an actual appointment, they may do so by writing the Clerk's Office, 600 W. Capitol Avenue, Room A149, Little Rock, Arkansas, 72201-3325, or the Clerk's Office, P. O. Box 1547, Fort Smith, Arkansas, 72902-1547, and notifying the Court of their willingness to have their names advanced on the list of attorneys to be appointed. Attorneys volunteering in this manner will be exempt from future appointments under this Local Rule for two years from the date of any actual appointment received. (Adopted and effective May 5, 1987; amended November 10, 2009.)

Rule 83.8. Communications by United States Attorney regarding persons sentenced by this court.

The United States Attorney and his staff shall not communicate in writing with the United States Bureau of Prisons, the United States Parole Commission, or the United States Probation Office concerning any person remanded to the custody of the Attorney General by this court following the sentencing of that person unless the United States Attorney shall furnish copies of the communication to the sentencing judge. If the United States Attorney communicates orally with the Bureau of Prisons, the Parole Commission, or the Probation Office concerning such a person, he shall reduce the substance of the communication to writing and furnish copies to the sentencing judge. The sentencing judge shall then determine whether such communications should also be transmitted to the defendant and/or his attorney. (Adopted and effective February 1, 1982; revised September 1, 1982.)

APPENDIX**MODEL FEDERAL RULES OF DISCIPLINARY ENFORCEMENT**

The United States District Courts for the Eastern and Western Districts of Arkansas, in furtherance of their inherent power and responsibility to supervise the conduct of attorneys who are admitted to practice before it, or admitted for the purpose of a particular proceeding (*pro hac vice*), promulgate the following Rules of Disciplinary Enforcement superseding all of its other Rules pertaining to disciplinary enforcement heretofore promulgated. (Adopted and effective May 1, 1980; Rule XI(A) revised July 1, 1985; Rule XI(E) amended March 26, 1992; amended November 10, 2009.)

Rule I. Attorneys Convicted of Crimes.

A. Upon the filing with this Court of a certified copy of a judgment of conviction demonstrating that any attorney admitted to practice before the Court has been convicted in any Court of the United States, or the District of Columbia, or of any state, territory, commonwealth or possession of the United States of a serious crime as hereinafter defined, the Court shall enter an order immediately suspending that attorney, whether the conviction resulted from a plea of guilty, or *nolo contendere* or from a verdict after trial or otherwise, and regardless of the pendency of any appeal, until final disposition of a disciplinary proceeding to be commenced upon such conviction. A copy of such order shall immediately be served upon the attorney. Upon good cause shown, the Court may set aside such order when it appears in the interest of justice to do so.

B. The term "serious crime" shall include any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime in the jurisdiction where the judgment was entered, involves false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft or an attempt or a conspiracy or solicitation of another to commit a "serious crime".

C. A certified copy of a judgment of conviction of any attorney for any crime shall be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against that attorney based upon the conviction.

D. Upon the filing of a certified copy of a judgment of conviction of an attorney for a serious crime, the Court shall in addition to suspending that attorney in accordance with the provisions of this Rule, also refer the matter to counsel for the institution of a disciplinary proceeding before the Court in which the sole issue to be determined shall be the extent of the final discipline to be imposed as a result of the conduct resulting in the conviction, provided that a disciplinary proceeding so instituted will not be brought to final hearing until all appeals from the conviction are concluded.

E. Upon the filing of a certified copy of a judgment of conviction of an attorney for a crime not constituting a “serious crime”, the Court may refer the matter to counsel for whatever action counsel may deem warranted, including the institution of a disciplinary proceeding before the Court; provided, however, that the Court may in its discretion make no reference with respect to convictions for minor offenses.

F. An attorney suspended under the provisions of this Rule will be reinstated immediately upon the filing of a certificate demonstrating that the underlying conviction of a serious crime has been reversed but the reinstatement will not terminate any disciplinary proceeding then pending against the attorney, the disposition of which shall be determined by the Court on the basis of all available evidence pertaining to both guilt and the extent of discipline to be imposed.

Rule II. Discipline Imposed By Other Courts.

A. Any attorney admitted to practice before this Court shall, upon being subjected to public discipline by any other Court of the United States or the District of Columbia, or by a court of any state, territory, commonwealth or possession of the United States, promptly inform the Clerk of this Court of such action.

B. Upon the filing of a certified or exemplified copy of a judgment or order demonstrating that an attorney admitted to practice before this Court has been disciplined by another Court, this Court shall forthwith issue a notice directed to the attorney containing:

1. A copy of the judgment or order from the other court; and
2. An order to show cause directing that the attorney inform this Court within 30 days after service of that order upon the attorney, personally or by mail, of any claim by the attorney predicated upon the grounds set forth in (D) hereof that the imposition of the identical discipline by the Court would be unwarranted and the reasons therefor.

C. In the event the discipline imposed in the other jurisdiction has been stayed there, any reciprocal discipline imposed in this Court shall be deferred until such stay expires.

D. Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of (B) above, this Court shall impose the identical discipline unless the respondent-attorney demonstrates, or this Court finds, that upon the face of the record upon which the discipline in another jurisdiction is predicated it clearly appears:

1. that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
2. that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this Court could not, consistent with its duty, accept as final conclusion on that subject; or

3. that the imposition of the same discipline by this Court would result in grave injustice; or

4. that the misconduct established is deemed by this Court to warrant substantially different discipline.

Where this Court determines that any of said elements exist, it shall enter such other order as it deems appropriate.

E. In all other respects, a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct for purposes of a disciplinary proceeding in the Court of the United States.

F. This Court may at any stage appoint counsel to prosecute the disciplinary proceedings.

Rule III. Disbarment on Consent or Resignation in Other Courts.

A. Any attorney admitted to practice before this Court who shall be disbarred on consent or resign from the bar of any other Court of the United States or the District of Columbia, or from the Bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, shall, upon the filing with this Court of a certified or exemplified copy of the judgment or order accepting such disbarment on consent or resignation, cease to be permitted to practice before this Court and be stricken from the roll of attorneys admitted to practice before this Court.

B. Any attorney admitted to practice before this Court shall, upon being disbarred on consent or resigning from the Bar of any other Court of the United States or the District of Columbia, or from the Bar of any state, territory, commonwealth or possession of the United States while an investigation into allegations of misconduct is pending, promptly inform the Clerk of this Court of such disbarment on consent or resignation.

Rule IV. Standards for Professional Conduct.

A. For misconduct defined in these Rules, and for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before this Court may be disbarred, suspended from practice before this Court, reprimanded or subjected to such other disciplinary action as the circumstances may warrant.

B. Acts or omissions by an attorney admitted to practice before this Court, individually or in concert with any other person or persons, which violate the Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship. The Code of Professional Responsibility or Rules of Professional Conduct adopted by this Court is the Code of Professional Responsibility or Rules of Professional Conduct adopted by the highest court of the state in which this Court sits, as amended from time to time by that state court, except as otherwise provided by specific Rule of this Court after consideration of comments by representatives of bar associations within the state.

Rule V. Disciplinary Proceedings.

A. When misconduct or allegations of misconduct which, if substantiated, would warrant discipline on the part of an attorney admitted to practice before this Court shall come to the attention of a Judge of this Court, whether by complaint or otherwise, and the applicable procedure is not otherwise mandated by these Rules, the Judge shall refer the matter to counsel for investigation and the prosecution of a formal disciplinary proceeding or the formulation of such other recommendation as may be appropriate.

B. Should counsel conclude after investigation and review that a formal disciplinary proceeding should not be initiated against the respondent-attorney because sufficient evidence is not present, or because there is pending another proceeding against the respondent-attorney, the disposition of which in the judgment of the counsel should be awaited before further action by this Court is considered or for any other valid reason, counsel shall file with the Court a recommendation for disposition of the matter, whether by dismissal, admonition, deferral or otherwise setting forth the reasons therefor.

C. To initiate formal disciplinary proceedings, counsel shall obtain an order of this Court upon a showing of probable cause requiring the respondent-attorney to show cause within 30 days after service of that order upon that attorney, personally or by mail, why the attorney should not be disciplined. The order to show cause shall include the form certification of all courts before which the respondent-attorney is admitted to practice, as specified in form appended to these Rules.

D. Upon the respondent-attorney's answer to the order to show cause, if any issue of fact is raised or the respondent-attorney wishes to be heard in mitigation, this Court shall set the matter for prompt hearing before one or more Judges of this Court, provided however that if the disciplinary proceeding is predicated upon the complaint of a Judge of this Court, the hearing shall be conducted before a panel of three other Judges of this Court appointed by the Chief Judge, or, if there are less than three Judges eligible to serve or the Chief Judge is the complainant, by the Chief Judge of the Court of Appeals for this Circuit. The respondent attorney shall execute the certification of all courts before that respondent attorney is admitted to practice, in the form specified, and file the certification with his or her answer.

Publisher's Notes. The form referred to in this section follows the last rule in this appendix.

Rule VI. Disbarment on Consent While Under Disciplinary Investigation or Prosecution.

A. Any attorney admitted to practice before this Court who is the subject of an investigation into, or a pending proceeding involving, allegations of misconduct may consent to disbarment, but only by delivering to this Court an affidavit stating that the attorney desires to consent to disbarment and that:

1. the attorney's consent is freely and voluntarily rendered; the attorney is not being subjected to coercion or duress; the attorney is fully aware of the implication of so consenting;

2. the attorney is aware that there is a presently pending investigation or proceeding involving allegations that there exist grounds for the attorney's discipline the nature of which the attorney shall specifically set forth;

3. the attorney acknowledges that the material facts so alleged are true, and

4. the attorney so consents because the attorney knows that if charges were predicated upon the matters under investigation, or if the proceeding were prosecuted, the attorney could not successfully defend himself.

B. Upon receipt of the required affidavit, this Court shall enter an order disbarring the attorney.

C. The order disbarring the attorney on consent shall be a matter of public record. However, the affidavit required under the provision of this Rule shall not be publicly disclosed or made available for use in any other proceeding except upon order of this Court.

Rule VII. Reinstatement.

A. *After Disbarment or Suspension.* An attorney suspended for three months or less shall be automatically reinstated at the end of the period of suspension upon the filing with the Court of an affidavit of compliance with the provisions of the order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of this Court, except as provided in Rule XI(H).

B. *Time of Application Following Disbarment.* A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment.

C. *Hearing on Application.* Petitions for reinstatement by a disbarred or suspended attorney under this Rule shall be filed with the Chief Judge of this Court. Upon receipt of the petition, the Chief Judge shall promptly refer the petition to counsel and shall assign the matter for prompt hearing before one or more judges of this Court, provided however that if the disciplinary proceeding was predicated upon the complaint of a Judge of this Court, the hearing shall be conducted before a panel of three other Judges of this Court appointed by the Chief Judge, or if there are less than three Judges eligible to serve or the Chief Judge was the complainant, by the Chief Judge of the Court of Appeals for this Circuit. The Judge or Judges assigned to the matter shall within 30 days after referral schedule a hearing at which the petitioner shall have the burden of demonstrating by clear and convincing evidence that he has the moral qualifications, competency and learning in the law required for admission to practice law before this Court and that his resumption of the practice of law will not be detrimental to the integrity and standing of the bar or to the administration of justice, or subversive of the public interest.

D. *Duty of Counsel.* In all proceedings upon a petition for reinstatement, cross-examination of the witness of the respondent-attorney and the submission of evidence, if any, in opposition to the petition shall be conducted by counsel.

E. *Deposit for Cost of Proceeding.* Petitions for reinstatement under this Rule shall be accompanied by an advance cost deposit in an amount to be set from time to time by the Court to cover anticipated costs of the reinstatement proceeding.

F. *Conditions of Reinstatement.* If the petitioner is found unfit to resume the practice of law, the petition shall be dismissed. If the petitioner is found fit to resume the practice of law, the judgment shall reinstate him, provided that the judgment may make reinstatement conditional upon the payment of all or part of the costs of the proceedings, and upon the making of partial or complete restitution to parties harmed by the petitioner whose conduct led to the suspension or disbarment. Provided further, that if the petitioner has been suspended or disbarred for five years or more, reinstatement may be conditioned, in the discretion of the Judge or Judges before whom the matter is heard, upon the furnishing of proof of competency and learning in the law, which proof may include certification by the bar examiners of a state or other jurisdiction of the attorney's successful completion of an examination for admission to practice subsequent to the date of suspension or disbarment.

G. *Successive Petitions.* No petition for reinstatement under this Rule shall be filed within one year following an adverse judgment upon a petition for reinstatement filed by or on behalf of the same person.

Rule VIII. Attorneys Specifically Admitted.

Whenever an attorney applies to be admitted or is admitted to this Court for purpose of a particular proceeding (*pro hac vice*), the attorney shall be deemed thereby to have conferred disciplinary jurisdiction upon this Court for any alleged misconduct of that attorney arising in the course of or in the preparation for such proceeding.

Rule IX. Service of Papers and Other Notices.

Service of an order to show cause instituting a formal disciplinary proceeding shall be made by personal service or by registered or certified mail addressed to the respondent-attorney at the address shown in the most recent registration filed pursuant to Rule XI(F) hereof. Service of any other papers or notices required by these Rules shall be deemed to have been made if such paper or notice is addressed to the respondent-attorney at the address shown on the most recent registration statement filed pursuant to Rule XI(F) hereof, or to counsel or the respondent's attorney at the address indicated in the most recent pleading or other document filed by them in the course of any proceeding.

Rule X. Appointment of Counsel.

Whenever counsel is to be appointed pursuant to these Rules to investigate allegations of misconduct or prosecute disciplinary proceedings or in conjunction with a reinstatement petition filed by a disciplined attorney, this Court shall appoint as counsel the disciplinary agency of the Supreme Court of Arkansas, wherein this Court sits, or the attorney maintains his principal office in the case of the Courts of Appeal or other disciplinary agency having jurisdiction. If no such disciplinary agency exists or such disciplinary agency declines appointment, or such appointment is clearly

inappropriate, this Court shall appoint as counsel one or more members of the Bar of this Court to investigate allegations of misconduct or to prosecute disciplinary proceedings under these Rules, provided, however, that the respondent-attorney may move to disqualify an attorney so appointed who is or has been engaged as an adversary of the respondent-attorney in any matter. Counsel, once appointed, may not resign unless permission to do so is given by this Court.

Rule XI. Periodic Assessment of Attorneys; Registration Statements.

A. Every attorney admitted to practice before this Court shall pay to the Clerk of the United States District Court an annual fee of \$5 for each fiscal year. The first payment will be due October 1, 1980. Said fee shall be used to pay the cost of disciplinary administration and enforcement under these Rules, (but only by those courts which have adopted these rules and have required registration and assessment) or as provided in Rule 83.6 of these Local Rules.

B. Payment of the fee prescribed hereunder shall be a condition precedent to any application for admission pro hac vice by any attorney not otherwise admitted to this Court.

C. An attorney admitted to practice before this Court as well as one or more other courts of the United States shall be required to make only a single payment of the fee prescribed hereunder in any fiscal year regardless of the number of Courts of the United States to which he may be admitted.

D. Any attorney who fails to pay the fee required under (A) above within 90 days shall be summarily suspended, provided a notice of delinquency has been forwarded to him by certified mail, return receipt requested, addressed to his last known business address at least 30 days prior to such suspension.

E. Any attorney suspended under the provisions of (D) above shall be reinstated without further order upon payment of all arrears and a penalty of \$15.00 per year from the date of his last payment to the date of his request for reinstatement.

F. To facilitate the collection of the annual fee provided for in (A) above, every person required by this Rule to pay an annual fee shall, on or before January 1st of every year, commencing January 1, 1981, file with the Clerk of the United States District Court a registration statement, on a form prescribed by the Clerk of the United States District Court setting forth his current residence and office addresses; the bars of all states, territories, districts, commonwealths or possessions or other Courts of the United States to which the attorney is admitted. In addition to such statement, every attorney subject to these Rules shall file with the Clerk, United States District Court, a supplemental statement of any change in the information previously submitted within 30 days of such change. All persons first becoming subject to these Rules by admission to practice before this Court after October 1, 1980, shall file the statement required by this Rule at the time of admission and shall pay the fee prescribed by (A) and (C) above for the fiscal year then in effect without proration.

G. Within 30 days of the receipt of a statement and payment or a supplement thereto filed by an attorney in accordance with the provisions of (A) and (F) above, the Clerk of the United States District Court shall

acknowledge receipt thereof, on a form prescribed for that purpose, in order to enable the attorney on request to demonstrate compliance with the requirements of (A) and (F) above.

H. Any attorney who fails to file the statement or supplement thereto in accordance with the requirements of (F) above shall be summarily suspended, provided a notice of delinquency has been forwarded to him by certified mail, return receipt requested, addressed to his last known business address at least 30 days prior to such suspension. He shall remain suspended until he shall have complied therewith, whereupon he shall become reinstated without further order.

I. An attorney who has retired or is not engaged in the practice of law before a Court of the United States may advise the Clerk of the United States District Court in writing that he desires to assume inactive status and discontinue the practice of law before the Courts of the United States. Upon the filing of such notice, the attorney shall no longer be eligible to practice law in this Court. An attorney who is retired or on inactive status shall not be obligated to pay the annual fee imposed by this Rule upon active practitioners.

J. Upon the filing of a notice to assume inactive status, the attorney shall be removed from the roll of those classified as active until and unless he requests and is granted reinstatement to the active rolls. Reinstatement shall be granted (unless the attorney is subject to an outstanding order of suspension of disbarment or has been on inactive status for five years or more) upon the payment of any assessment in effect for the year the request is made and any arrears accumulated prior to the transfer to inactive status. Attorneys who have been suspended or on inactive status for over five years before filing a petition for reinstatement to active status may be required in the discretion of this Court, to establish proof of competency and learning in the law. The proof may include evidence that the attorney has continued to engage in the practice of law in good standing in another jurisdiction or before any other court or certification by the Bar Examiners of a state or other jurisdiction in which the attorney is admitted to practice, or his successful completion of an examination for admission to practice subsequent to the date of suspension or transfer to inactive status.

K. The Clerk of Court for the Eastern District shall monitor the fund and make a written report of the use of the fund and the fund balance remaining to the judges and magistrate judges of the Eastern and Western Districts by the fourteenth day of each month.

Rule XII. Payment of Fees and Costs.

At the conclusion of any disciplinary investigation or prosecution, if any, under these Rules, counsel may make application to this Court for an order awarding reasonable fees and reimbursing costs expended in the course of such disciplinary investigation or prosecution. Any such order shall be submitted to the Clerk, United States District Court, which shall pay the amount required thereunder from the funds collected pursuant to Rule XI(A) hereof.

Rule XIII. Duties of the Clerk.

A. Upon being informed that an attorney admitted to practice before this Court has been convicted of any crime, the Clerk of this Court shall

determine whether the clerk of the court in which such conviction occurred has forwarded a certificate of such conviction to this Court. If a certificate has not been so forwarded, the Clerk of this Court shall promptly obtain a certificate and file it with this Court.

B. Upon being informed that an attorney admitted to practice before this Court has been subjected to discipline by another court, the Clerk of this Court shall determine whether a certified or exemplified copy of the disciplinary judgment or order has been filed with this Court, and, if not, the Clerk shall promptly obtain a certified or exemplified copy of the disciplinary judgment or order and file it with this Court.

C. Whenever it appears that any person convicted of any crime or disbarred or suspended or censured or disbarred on consent by this Court is admitted to practice law in any other jurisdiction or before any other court, the Clerk of this Court shall, within fourteen days of that conviction, disbarment, suspension, censure or disbarment on consent, transmit to the disciplinary authority in such other jurisdiction, or for such other court, a certificate of the conviction or a certified exemplified copy of the judgment or order of disbarment, suspension, censure or disbarment on consent, as well as the last known office and residence addresses of the defendant or respondent.

D. The Clerk of this Court shall, likewise, promptly notify the National Discipline Data Bank operated by the American Bar Association of any order imposing public discipline upon any attorney admitted to practice before this Court.

Rule XIV. Jurisdiction.

Nothing contained in these Rules shall be construed to deny to this Court such powers as are necessary for the Court to maintain control over proceedings conducted before it, such as proceedings for contempt under Title 18 of the United States Code or under Rule 42 of the Federal Rules of Criminal Procedure.

Rule XV. Pending Proceedings.

Any formal disciplinary proceeding pending before this Court on the effective date of these Rules shall be concluded under the procedure existing prior to the effective date of these Rules.

APPENDIX TO DISCIPLINARY ENFORCEMENT RULES

DECLARATION OF ADMISSIONS TO PRACTICE

In Re _____

Disciplinary No. _____

I, _____, am the attorney who has been served with an order to show cause why disciplinary action should not be taken in the above captioned matter.

I am a member of the bar of this court.

I have been admitted to practice before the following state and federal courts, in the years, and under the license record numbers shown below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____
(Date)

Signature

(Full name — typed or printed)

(Address of Record)

This declaration must be signed, and delivered to the Court with the attorney's answer to the order to show cause or any waiver of an answer. Failure to return this declaration may subject an attorney to further disciplinary action. Under 28 U.S.C. Sec. 1746, this declaration under penalty of perjury has the same effect as a sworn declaration made under oath.

Publisher's Notes. This form is referenced in Rule V.

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Publisher's Notes. The United States Bankruptcy Courts for the Eastern and Western Districts of Arkansas have adopted the following Local Rules. See also rules of procedure for the United States District Courts for the Eastern and Western Districts of Arkansas.

The Local Rules were renumbered in 1999 in order to align them with their corresponding federal Bankruptcy Rules.

The Local Rules were revised effective January 12, 2006, in order to align them with recent revisions to their corresponding federal Bankruptcy Rules.

Local Rule 1001-1. Matters not covered by local rules.

All matters of procedure not specifically dealt with by these local rules are governed by the applicable Federal Rules of Bankruptcy Procedure.

(All references to the "Court" in these local rules refer to the United States Bankruptcy Court for the Eastern and Western Districts of Arkansas.) (Adopted January 12, 2006.)

Local Rule 1020-1. Operating reports.

A debtor-in-possession or a trustee in any case pending under Chapter 11, a debtor-in-possession in a case pending under Chapter 12, and a business debtor in cases pending under Chapter 13 of the Bankruptcy Code shall be required to file monthly operating reports of a kind and in the manner prescribed by the Office of the United States Trustee. (Adopted August 1, 1985; revised May 12, 1988; revised January 12, 2006.)

Local Rule 2015-1. Motor vehicle physical damage insurance in Chapter 13 cases.

I.

TERMS OF POLICY

The Trustee shall, as soon as reasonably possible, enter into a contract and thereafter maintain a contract, if reasonably possible, with an Insurer

to provide motor vehicle physical damage insurance coverage at least as beneficial to the debtors and creditors as described below.

DEFINITIONS

As used in this Rule the following shall have the meaning shown.

Insurer. An insurance company chosen by the Trustee, qualified under state law to offer insurance coverage of the type described in this Rule in the State of Arkansas.

Trustee. The standing chapter 13 trustee appointed pursuant to a designation by the U.S. Trustee for the Districts of Arkansas, Nebraska and Missouri, dated October 31, 1988 and the ratification and approval of the designation by the Director and Counsel, Executive Office of the United States Trustee, Department of Justice, dated November 1, 1988, or his or her successor.

Interested Party. A person or entity which has an insurable interest in a motor vehicle, including a co-owner, secured creditor, co-obligor on a secured loan, and debtor(s).

Motor Vehicle. Any licensed land motor vehicle designed for travel on public roads, except motorcycles, truck-type tractors having a gross vehicle weight of 10,000 pounds or more and intended for over the road transportation or delivery of goods or merchandise and recreational vehicles.

Value or Valuation. The fair market retail value of the Motor Vehicle as initially determined by reference to publication of the National Automobile Dealers Association.

THE POLICY

1. A Master Policy providing coverage equivalent to a Standard Automobile Physical Damage Insurance Policy.

2. A Certificate of Insurance to be issued to each Interested Party.

3. Coverage for Motor Vehicles shall be provided for Motor Vehicles having a Value in excess of \$500.00 and shall consist of a comprehensive deductible of \$50.00, a collision deductible of \$100.00 and maximum coverage per vehicle of \$60,000.00.

4. Coverage shall be afforded at a flat rate per \$100.00 valuation without regard to the debtor's age, sex, race, marital status, place of residence, previous driving record or use of the vehicle.

5. The Trustee's Master Policy will not be primary insurance. If there is motor vehicle physical damage insurance other than the insurance provided by the Trustee's Master Policy at the time of loss, then there will be no coverage under the Trustee's Master Policy except as excess and in no event as contributory insurance and then only after all other insurance has been exhausted.

6. Within two days after the date that a Chapter 13 Petition is dismissed or converted by an order of the court, the Insurer shall mail a notice of cancellation under this insurance program to all Interested Parties. Said notice of cancellation shall state that the insurance under this policy shall terminate 30 days after the date set forth in the notice of cancellation which date shall coincide with the date of the mailing of the notice. In the absence of notice of cancellation and except as otherwise provided herein, insurance under this policy shall terminate 30 days after the date of entry of the written order of dismissal or conversion of the Chapter 13 case regardless of actual notice of dismissal.

7. Any Interested Party who determines that there is no motor vehicle physical damage insurance on a Motor Vehicle in which some interested party has a co-ownership, lien or other insurable interest may move for an Order requesting coverage under the Trustee's Master Policy. If the motion is granted, insurance coverage shall be effective from the date of the Order Adding Insurance and premiums shall begin to be earned from that same date.

8. All claims under the Trustee's Master Policy must be made by sworn proof of loss delivered to the Insurer within 91 days after the insured loss on forms to be supplied by the Insurer.

9. If a debtor has other motor vehicle physical damage insurance coverage at the time of the filing of his Chapter 13 Petition and provides that information to the Trustee, as herein before provided, so as to not be insured under the Trustee's Master Policy and thereafter the debtor's other insurance expires or is revoked, an Interested Party may file a motion to have debtor's motor vehicle insured under the Trustee's Master Policy. If said motion is filed before the termination date of the other insurance, then coverage under the Trustee's Master Policy shall commence on the date of the termination of the other insurance. If said motion is filed after the termination date of the other insurance, then coverage under the Trustee's Master Policy shall commence on the date of the Court's order adding the insurance to the debtor's plan.

10. If the debtor purchases a Motor Vehicle and grants a lien on it in favor of a creditor during the course of the debtor's Chapter 13 plan and in such a fashion as to include the creditor in the plan, then insurance coverage under the Trustee's Master Policy on such motor vehicle shall commence on the date an Order Adding Insurance is entered.

COVERAGE

11. Coverage shall automatically be afforded upon filing of a Chapter 13 Petition and continue for the full term of the plan for all Motor Vehicles listed in debtor's Chapter 13 schedules and statement of affairs unless:

- (a) The debtor provides evidence of other insurance; or
- (b) There is no Interested Party other than the debtor(s); or
- (c) The case is dismissed.

12. A debtor may elect to maintain coverage after no other Interested Party exists. A debtor may elect to have coverage even if there is no other Interested Party when the Petition is filed.

13. If a debtor procures motor vehicle physical insurance coverage, other than pursuant to the Trustee's Master Policy, after the date of the filing of the Chapter 13 Petition and provides proof thereof by motion, then insurance coverage under the Trustee's Master Policy shall only be for losses incurred between the time of the filing of the Chapter 13 Petition and the date the debtor procures the other insurance.

14. If a debtor, at or prior to the Section 341(a) meeting, provides proof of motor vehicle physical insurance coverage for losses incurred at the time of and after the filing of the Chapter 13 Petition, then no premium shall be charged for insurance under the Trustee's Master Policy. If the debtor does not provide such proof of insurance coverage, then an insurance premium shall be paid by the Trustee and charged against the debtor as a priority, administrative expense for insurance coverage under the Trustee's Master Policy from the date of filing of the Chapter 13 Petition to the date of the entry of a court order terminating insurance coverage under the Trustee's

Master Policy. The Trustee may make motion for such orders as are necessary to increase the debtor's payments under the plan to pay for the insurance required by this local rule.

PREMIUMS

15. The Insurer shall have the right to setoff against payment of claims any unpaid insurance premiums due for insurance provided to the debtor under the Trustee's Master Policy.

16. To assure that premiums are timely paid so that coverage will remain in effect, the amount of \$100.00 shall be held as a priority, administrative expense by the Trustee in all Chapter 13 cases with coverage under the Trustee's Master Policy and said amount shall be utilized for the payment of delinquent premiums.

II.

IMPLEMENTATION OF PROGRAM

During the time the Trustee's Master Policy is in effect, the following procedures shall be followed:

1. The Insurer shall produce an initial report substantially as set forth in Form I — Chapter 13 Motor Vehicle Physical Damage Insurance Program — Initial Report. Such Initial Report (Form I) shall be mailed to the Trustee and each Interested Party.

2. Concurrently with the issuance of Form I, the Insurer shall mail Form II — Interested Party Verification — to each Interested Party.

3. At or before the Section 341(a) meeting, a debtor and/or debtor's attorney shall provide to the Trustee written evidence of motor vehicle damage insurance which notes the interest of all Interested Parties in any Motor Vehicle. If written evidence is not so provided, the debtor's plan shall be deemed amended to provide for an additional payment to the Trustee at the monthly premium rate indicated in Form I.

4. The issuance of Form I by the Insurer shall authorize the Trustee to provide a Certificate of Insurance (substantially as Form III — Certificate of Insurance) to Interested Parties. The Certificate of Insurance shall be provided as soon after the Section 341(a) meeting as is reasonably practicable.

5. Any debtor shall have the right to cause the insurance which has been issued to be canceled at any time by motion, substantially in conformity with Form IV, for cause, including:

- (a) Proof of insurance coverage for the Interested Parties;
- (b) Waiver of coverage by all Interested Parties;
- (c) Motor Vehicle is inoperable; or
- (d) Value of Motor Vehicle is less than Five Hundred Dollars (\$500.00).

6. Insurance coverage shall be automatically provided upon motion filed with the Trustee (substantially in conformity with Form V) by an Interested Party stating that there is no insurance on a Motor Vehicle. The plan payments shall be increased after motion by the Trustee by an order substantially in conformity with Form VI.

7. A debtor may choose to continue to have insurance coverage under the Master Policy after all Interested Parties have been paid in full by filing an affidavit with the trustee substantially in conformity with Form VII. The plan payments shall be increased after motion by an order substantially in conformity with Form VIII.

8. A creditor who has a lien or security interest in motor vehicle may file an election with the Trustee that the creditor does not want any of its borrowers to be able to purchase insurance under the Trustee's Master Policy. If a creditor files such an election (Form IX), the provisions of this Local Rule shall not be applicable to any motor vehicle in which the creditor has a lien or security interest in any case filed thereafter. Insurance coverage pursuant to this Local Rule shall continue in all cases pending at the time a creditor's election is filed. If after having filed such an election, the creditor revokes its election (Form X), then the Local Rule shall be in effect as to all cases in which the creditor has a lien or security interest in a motor vehicle filed subsequent to the revocation of the election and this Local Rule shall become retroactively applicable to all pending cases in which the creditor has a lien on or security interest in a motor vehicle as if the case were filed on the day the creditor revokes the election. (Adopted July 1, 1990; revised January 12, 2006.)

Local Rule 2072-1. Notice to other courts.

As soon as possible after the date the bankruptcy petition is filed with the United States Bankruptcy Clerk, the debtor is required to give written notification to each court or administrative tribunal in which there is pending litigation involving the debtor. Copies of that written notification shall be mailed on the same date to all attorneys of record in the pending lawsuits. (Adopted August 1, 1985.)

Local Rule 2090-1. Attorneys — Admission to practice.

(a) *Admission Generally.* The bar of this Court shall consist of all attorneys admitted to practice before the United States District Court for the Eastern and Western Districts of Arkansas unless said attorney has been specifically suspended or disbarred by the Court.

(b) *Admission Pro Hac Vice.* Any attorney who is a member in good standing of the bar of another state may be admitted to this Court *pro hac vice* upon a proper showing of qualifications to participate in a particular case or proceeding before this Court. Admission *pro hac vice* shall be by written motion accompanied by movant's declaration signed under penalty of perjury asserting good standing in the state bar where movant maintains a law office. The applicant shall designate a member of the bar of this Court who maintains an office in the Eastern or Western District of Arkansas as local counsel. The Court may, for good cause shown, waive the requirement for local counsel upon written motion by the applicant. This rule is subject to the exceptions and practice by attorneys appearing in the United States District Court in the Texarkana Division of the Western District of Arkansas who reside in Texarkana, Texas. (Adopted August 1, 1985; revised January 12, 2006.)

Local Rule 2090-2. Attorney discipline and disbarment.

The standard of professional conduct for attorneys practicing in this Court is governed by the Arkansas Rules of Professional Conduct and Federal Rule of Bankruptcy Procedure 9011. The Court will refer violations of the Arkansas Rules of Professional Conduct to the Arkansas Committee on Professional Conduct for such actions and sanctions as the Committee

deems appropriate. Additionally, the Court shall have such authority and discretion as are permitted by and under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, statutory and common law, and the express and inherent powers conferred upon them. Sanctions may include suspension or disbarment from the practice before this Court.

Any attorney who is suspended or disbarred, by the United States District Court for the Eastern or Western District of Arkansas is automatically suspended or disbarred, from practice before this Court for the same duration as ordered by the United States District Court. (Adopted January 12, 2006.)

CASE NOTES

Misconduct.

Bankruptcy court exercised powers under 11 U.S.C.S. § 105, Fed. R. Bankr. P. 9011 and this rule in sanctioning counsel for violating a prior order suspending him from practice in

the court pending consideration by a state supreme court of the bankruptcy court's findings that counsel had committed misconduct. In re Burnett, 455 B.R. 187 (Bankr. E.D. Ark. 2011).

Local Rule 5001-1. Fayetteville satellite office.

Repealed effective January 12, 2006.

Local Rule 5001-2. Location and office hours of clerk's office.

The Clerk's office for the Eastern and Western Districts of Arkansas is in the United States Bankruptcy Courthouse at 300 W. Second Street, Little Rock, Arkansas.

Mailing Address:
300 West Second Street
Little Rock, AR 72201
Telephone: (501) 918-5500

A satellite Clerk's Office in the Western District is located in Room 316 of the John Paul Hammerschmidt Federal Building, 35 E. Mountain Street, Fayetteville, Arkansas for the purpose of accepting all filings for the Fayetteville, Harrison, Fort Smith and Hot Springs Divisions.

Mailing Address:
35 East Mountain Street, Suite 316
Fayetteville, AR 72701
Telephone: (501) 582-9800

Office hours for both offices are 8:00 a.m. to 5:00 p.m., Monday through Friday. (Closed on legal holidays.) (Adopted August 1, 1985; revised December 21, 1998; revised January 12, 2006.)

Local Rule 5005-1. Computer related requirements.

Repealed effective January 12, 2006.

Local Rule 5005-4. Electronic filing.

All pleadings and documents required to be filed with the Court shall be electronically filed. Electronic filing shall mean filed over the internet using

the Court's Electronic Case ("ECF") System. Orders submitted in open court shall be announced and then emailed in Portable Document Format ("PDF format").

The Court adopts the *Administrative Procedures for Electronically Filed Cases and Related Documents* as the rules governing filing by electronic means and governing the ECF system for this Court. A document filed by electronic means in compliance with these rules constitutes a written paper for the purpose of applying all Local Rules, Standing Orders, the Federal Rules of Bankruptcy Procedure, and 11 U.S.C. § 107.

Exceptions to this required procedure for electronically filing documents and pleadings include:

- (1) Documents under seal.
- (2) Pleadings and/or documents submitted by parties without legal representation.
- (3) Proofs of Claim filed by a creditor who is not a registered user of ECF.
- (4) Filer's Internet failure.

Filers experiencing Internet failure shall submit a pleading and/or document on diskette or CD in PDF format with an "Affidavit and Request to File" attached. A sample Affidavit can be found on the Court's website. The Clerk's Office will electronically file the pleading and/or document on behalf of the filer.

- (5) Court's Internet failure.

If a filer attempts to electronically file a pleading and/or document but cannot do so because ECF is not accessible, the filer should consult the *Administrative Procedures for Electronically Filed Cases and Related Documents* for guidance.

- (6) Waiver Granted by Chief Judge.

Upon a written request by a party demonstrating adequate grounds, the Chief Judge may waive the requirement for electronic filing and/or any rule contained in the *Administrative Procedures for Electronically Filed Cases and Related Documents*.

Filers filing pleadings and/or documents via paper, who do not fall under one of the exemptions listed above, will be issued an Order to Show Cause why they cannot file electronically, and will be requested to appear before this Court.

The following information is to be provided at the time of filing a bankruptcy petition or adversary proceeding, whether or not such filing is accomplished by electronic means:

1. Attorneys are to include their complete address, phone number, and state bar number on all filings.
2. All information on the adversary proceeding cover sheet must be filled in completely. (Adopted January 12, 2006.)

CASE NOTES

Filing.

Counsel's delay in filing a bankruptcy case belied his claim that there was an urgent need to file the case because a skeletal petition could have been filed per Fed. R. Bankr.

P. 1007(c), which filing could have been accomplished electronically per Fed. R. Bank. P. 5001 and this rule. In re Burnett, 455 B.R. 187 (Bankr. E.D. Ark. 2011).

Local Rule 7026-1. Discovery rules.

Repealed effective November 8, 2001.

Publisher's Notes. Because F. R. Civ. P. 26 as amended in December 2000 no longer authorizes the Bankruptcy Court to opt out of any of its applicable provisions by local rule or general order, this rule, originally adopted 1/26/95, was in conflict with F. R. Civ. P. 26, and was therefore repealed November 8, 2001.

Local Rule 7033-1. Interrogatories and depositions.

Discovery depositions, interrogatories, requests for production or inspection and responses thereto shall not be filed with the Clerk of the Court except those portions of the discovery that are relevant to motions permitted by the Federal Rules of Bankruptcy Procedure as exhibits. (Adopted August 1, 1990; revised January 12, 2006.)

Local Rule 9013-1. Attorneys submitting orders.

Repealed effective January 12, 2006.

Local Rule 9015-1. Jury trial.

a. Issues triable as a matter of right by jury shall be by jury. The Federal Rules of Bankruptcy Procedure provide for demanding a jury trial.

b. On motion of a party or on its own motion, the Bankruptcy Court for the Eastern and Western Districts of Arkansas shall determine whether there is a right to jury trial on the issues for which a jury is demanded.

c. If a party is entitled to a jury trial on the issues for which a jury has been demanded and all parties express their consent by filing a statement pursuant to Federal Rule of Bankruptcy Procedure 9015, the Bankruptcy Court shall conduct a jury trial. If any party does not consent, the jury trial issue shall be referred to the appropriate United States District Court for further proceedings.

d. If a jury trial is appropriate for non-core issues and all parties consent to a jury trial, said consent shall also be deemed to be consent for the Bankruptcy Judge to enter a final and dispositive order. (Adopted May 20, 1992; revised March 9, 2001; revised January 12, 2006.)

Local Rule 9019-1. Consent orders.

a. This rule governs the submission of proposed orders concerning matters which are agreed to by the affected parties (referred to herein as "Consent Orders").

b. The party responsible for preparing the order is the party designated by the Court or the party agreed to by the parties themselves.

c. A party submitting a Consent Order to the Court shall forward a copy of the proposed order to the opposing attorney who shall have fourteen (14) days from the mailing or transmission of such order in which to object to the form or content of the order. Upon obtaining the signature(s), counsel should promptly submit the order to the Court. If opposing counsel does not respond in fourteen (14) days, the order is considered to be a Consent Order and the party preparing the order may submit it to the Court.

- d. Routine orders which by their nature are administrative according to the local practice (referred to herein as “Routine Orders”) may be submitted to the Court without complying with this local rule.
- e. An attorney shall not submit a proposed order unless the order is a Consent Order or a Routine Order, as defined in this rule. (Adopted January 12, 2006; amended December 1, 2009.)

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THE UNIVERSITY OF CHICAGO
DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

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RULES FOR THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Revised Dec.1, 1998; Apr. 1, 2001; Feb. 1, 2002; Dec. 1, 2002; Dec. 28,
2005; Dec. 1, 2008; Dec. 1, 2009.)

TITLE I. APPLICABILITY OF RULES

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF DISTRICT COURT

Rule

- 3A. (Reserved.)
- 3B. Appeal information form.
- 3C. Dismissal for failure to prosecute.
- 10A. Exhibits.
- 11A. Transmission of the record on appeal.

TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

TITLE V. EXTRAORDINARY WRITS

- 21A. Petitions for writs of mandamus and prohibition.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

- 22A. Death penalty cases.
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- 25A. Electronic and Facsimile Filing; Electronic Noticing and Service.
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- 27A. Motions.
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- 27C. Filing notices of appeal and motions to withdraw in criminal cases.
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Preface.

Based on Rule 47 of the Federal Rules of Appellate Procedure (FRAP), this court adopts the Eighth Circuit Rules of Appellate Procedure (8th Cir. R.), governing appeals to the court on and after December 1, 1998.

The Eighth Circuit Rules of Appellate Procedure supplement the Federal Rules of Appellate Procedure. Counsel should be familiar with both sets of rules and the federal statutes governing appeals, particularly 28 U.S.C. §§ 1291 and 1292.

For the convenience of counsel, the Eighth Circuit Rules are numbered to correspond to the Federal Rules of Appellate Procedure.

TITLE I. APPLICABILITY OF RULES

(See FRAP, Rules 1, 2)

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF DISTRICT COURT

(See FRAP, Rules 3 to 12)

Rule 3A. (Reserved.)

Rule 3B. Appeal information form.

In all civil cases except those brought under 28 U.S.C. §§ 2241, 2254, or 2255, the appellant must complete an Appeal Information Form (Form A), submit it with the notice of appeal to the clerk of the district court, and serve a copy on the appellee. The appellee may file and serve a supplemental statement (Form B) within three days after receiving service of Form A. Copies of Forms A and B may be obtained from the clerk of this court or from the clerks of the district courts.

Cross References. FRAP 3, 4, 26(b);
FRAP Appendix, Form 1 (Notice of Appeal);
8th Cir. R. 33A.

Rule 3C. Dismissal for failure to prosecute.

If an applicant fails to comply with the Federal Rules of Appellate Procedure or these rules, the clerk will notify the appellant and appellant's counsel that the appeal will be dismissed for want of prosecution unless appellant remedies the default within 14 days after the clerk issues the notice. If the appellant fails to comply within the 14-day period, the clerk will enter an order dismissing the appeal for want of prosecution and issue a certified copy of the order as the mandate to the clerk of the district court. After the appeal has been dismissed under this rule, there is no remedy for default except by order of the court. The dismissal of an appeal will not limit the court's authority to take disciplinary action against defaulting counsel in appropriate cases.

Cross References. FRAP 3(a)(2).

Rule 10A. Exhibits.

(a) *Duty of Appellant.* Subject to subparagraph (b) of 8th Cir. R.10A, appellant must ensure that all trial exhibits and all relevant pre-trial exhibits, or copies thereof, are submitted to the clerk of the court appeals no later than the filing of appellant's opening brief. If the trial exhibits and the relevant pre-trial exhibits were retained by the district court, appellant must ask the clerk of the district court to forward the exhibits to the clerk of the court of appeals. If the trial exhibits and the relevant pre-trial exhibits were not retained by the district court, appellant must prepare and submit a separate appendix containing the exhibits, or copies thereof. In the event appellant fails either to ask the district court to transmit the exhibits or to prepare a separate appendix of exhibits, the appellee may take steps to

ensure that all trial exhibits and all relevant pretrial exhibits, or copies thereof, are submitted to the clerk of the court of appeals no later than the filing of appellee's brief. In pro se cases, the district court will transmit the exhibits, and no separate appendix of exhibits is required. See 8th Cir. R. 30A(a)(2).

(b) *Physical Exhibits.* Physical exhibits should not be filed with the clerk of this court unless they are referred to in the brief and examination of the exhibits would aid the court in resolving an issue raised on appeal. Counsel should contact the clerk before submitting unusually bulky or large physical exhibits. In a criminal case, evidence such as firearms and drugs may be filed only with leave of court.

Rule 11A. Transmission of the record on appeal.

A certified copy of all docket entries in the proceeding below must be transmitted to the court in place of the entire record. See FRAP 11(e). The appellant's brief is due 40 days after filing of the docket entries. See FRAP 31(a)(1).

Cross References. FRAP 11(e), 30, 31(a);
8th Cir. R. 30A.

TITLE III. REVIEW OF A DECISION OF THE UNITED STATES TAX COURT

(See FRAP, Rules 13, 14)

TITLE IV. REVIEW OR ENFORCEMENT OF AN ORDER OF AN ADMINISTRATIVE AGENCY, BOARD, COMMISSION, OR OFFICER

(See FRAP, Rules 15 to 20)

TITLE V. EXTRAORDINARY WRITS

(See FRAP, Rule 21)

Rule 21A. Petitions for writs of mandamus and prohibition.

Within 14 days after the filing of the petition or as the court orders, the court must either dismiss the petition or direct that an answer be filed.

Cross References. FRAP 21.

TITLE VI. HABEAS CORPUS; PROCEEDINGS IN FORMA PAUPERIS

(See FRAP, Rules 22 to 24)

Rule 22A. Death penalty cases.

(a) *Notice to the Clerk.* The state attorney general or United States attorney must notify the clerk of the court promptly by telephone or fax when a warrant for execution is issued. The notice should provide the name

of the prisoner and the time and date of the scheduled execution. Upon receipt of the notice, the clerk will contact counsel for the inmate to determine the inmate's plan for litigation.

(b) *Emergency Nature of the Proceedings.* The clerk will treat all pleadings filed after the issuance of a warrant for execution as emergency matters and will require the parties to the litigation to file all pleadings with the court and to serve each other by facsimile. Where the length or nature of the documents makes facsimile filing impractical, the documents must be filed with the clerk and served on opposing counsel by overnight delivery service. If hand-delivery of documents would be quicker or more practical than facsimile or overnight-delivery, counsel may file or serve documents by hand-delivery. Counsel should contact the clerk for facsimile authorization and must provide the clerk with their facsimile numbers and home and other telephone numbers where they may be reached after regular business hours. The clerk will maintain business hours as may be required to facilitate the court's consideration of the proceedings.

(c) *Required Information.* In an application for second or successive habeas relief, the prisoner must provide the following information:

(1) the grounds for relief;

(2) a list of all pending litigation in federal or state court;

(3) the captions and case numbers of all previous habeas proceedings, including appeals to this court and certiorari petitions to the United States Supreme Court, and citations to any published state or federal court opinions;

(4) the outcome of all previous habeas petitions, including whether any prior petition was dismissed without prejudice or for failure to exhaust state remedies; and

(5) copies of all state or federal court opinions or judgments relating to the conviction and sentence.

(d) *Motions for Stay.* A motion for a stay of execution should be prepared as a separate document and should be filed simultaneously with the application for second or successive habeas relief.

(e) *Responses and Replies.* Upon receipt of an application for a second or successive habeas or a motion for stay of execution, the clerk will contact the state attorney general or the United States attorney and set a deadline for a response to the application or motion. If counsel for the petitioner wishes to file a reply, counsel should contact the clerk and obtain a filing deadline.

(f) *Other Challenges to an Execution.* Within twenty-four hours of its filing in United States district court, the petitioner must provide the clerk with a copy of any complaint in any civil action which challenges or seeks to stay the execution. Respondent and petitioner must promptly furnish the clerk with all subsequent pleadings in the matter, and petitioner must promptly notify the clerk of any opinion or dispositive order in the matter.

Cross References. FRAP 22.

Rule 22B. Second or Successive Habeas Corpus and Section 2255 Proceedings.

(a) In any application for second or successive habeas corpus relief or for second or successive motion under 28 U.S.C. § 2255 which is filed in this court, the petitioner or movant must provide the following information:

(1) the grounds for relief;

(2) if available, the filing dates, captions, docket numbers, and courts where all prior habeas proceedings or section 2255 motions and appeals were filed; and

(3) the outcome of all former habeas proceedings or section 2255 motions and appeals, including whether any prior petition was dismissed without prejudice or for failure to exhaust state remedies.

(b) The clerk will serve a copy of the application for second or successive habeas petition or section 2255 motion on the appropriate state attorney general or United States attorney.

(c) The state attorney general or United States attorney must file a response within 14 days of receipt of the application for second or successive habeas petition or section 2255 motion. The response must include:

(1) a brief response to the grounds for relief stated by petitioner or movant;

(2) information petitioner or movant has not supplied under Rule 22B(a)(2) and (3) of these local rules; and

(3) copies of orders and memorandum opinions in all former habeas proceedings and section 2255 motions filed by petitioner or movant.

TITLE VII. GENERAL PROVISIONS

(See FRAP, Rules 25 to 48)

Rule 25A. Electronic and Facsimile Filing; Electronic Noticing and Service.

(a) *Electronic Filing.* In cases or classes of cases as the clerk of court may select, the clerk is authorized to allow or to require any moving party to file a required document electronically. The electronic image of the document will constitute the original document for all court purposes. Filing is complete when the document is received in the clerk's database.

To each document filed electronically, the filer must add a certificate verifying that the original was signed by the attorney or party shown as the filer. The original signed document must be maintained by the filer for a period not less than the maximum allowable time to complete the appellate process. Upon request, the original document must be provided to other parties or to the court.

The clerk may allow a district court clerk to transmit the notice of appeal and other required docketing documents electronically. Receipt of these documents is complete for filing purposes when they are received in the clerk's database.

The clerk may require paper copies of any document filed electronically.

(b) *Electronic Noticing.* In cases or classes of cases as the clerk of court may select, the clerk is authorized to serve all papers on counsel of record electronically. Counsel who agree to accept electronic notice must agree that the electronic notice will be the only notice provided by the clerk.

(c) *Filing by Facsimile.* The clerk may establish a program to permit parties to file documents by facsimile.

Cross References. FRAP 25(a)(2)(D).

Rule 26.1A. Corporate Disclosure Statement.

The Corporate Disclosure Statement must be filed within 7 days after receipt of notice that the appeal has been docketed in this court.

Cross References. FRAP 26.1.

Rule 27A. Motions.

All motions must comply with FRAP 32(c)(2).

Cross References. FRAP 25 (filing and service), 26 (computation of time), 27, 32(b).

Rule 27B. Orders.

(a) *Orders the Clerk May Grant.* The clerk has discretion to enter orders on behalf of the court in procedural matters including, but not limited to:

- (1) applications to file briefs exceeding the page limits set forth in these rules and the Federal Rules of Appellate Procedure;
- (2) extensions of time for filing briefs and records;
- (3) extensions of time for designating the record under 8th Cir. R. 30A(b);
- (4) authorization to proceed on a deferred appendix under 8th Cir. R. 30A(b)(2);
- (5) corrections in briefs, pleadings, or the record;
- (6) supplementation of the record;
- (7) incorporation of records from former appeals;
- (8) consolidation of appeals;
- (9) substitution of parties;
- (10) motions to appear as amicus curiae;
- (11) requests by amicus curiae counsel to participate in oral argument by sharing time with other counsel;
- (12) advancement or continuance of cases;
- (13) appointment of counsel on appeal in cases prosecuted under the Criminal Justice Act;
- (14) withdrawal of appearance in civil cases;
- (15) extensions of time to file petitions for rehearing not to exceed 14 days;
- (16) transmission of records to the Supreme Court for use in connection with petitions for writs of certiorari;
- (17) entry of consent decrees in National Labor Relations Board cases and other governmental agency review cases; and
- (18) taxation of costs under 28 U.S.C. § 1920.

If any party opposes the action requested in any of the above matters or seeks reconsideration of an order entered under this section, the clerk must submit the matter for a ruling by a judge of this court.

(b) *Orders One Judge May Grant.* Subject to FRAP 27(c), one judge of the court may determine any motion and exercise any power including:

- (1) granting leave to appeal in forma pauperis and ordering preparation of a transcript at government expense;
- (2) granting appointment of counsel for an indigent defendant proceeding under 28 U.S.C. § 1915;
- (3) denying a motion to dismiss under 8th Cir. R. 47A; and

(4) ordering a temporary stay of any proceeding pending the court's determination of a stay application.

(c) *All Other Matters*. A panel of three judges will act in all other matters.

(d) *Reconsideration of Orders*. Any party adversely affected by an order issued under subdivisions (a), (b), or (c) may file a motion to reconsider, vacate, or modify the order within 14 days after its entry. The motion will be referred to a three-judge panel that includes all judges who previously acted on the matter.

Cross References. FRAP 27.

Rule 27C. Filing notices of appeal and motions to withdraw in criminal cases.

(a) *Notices of Appeal*. Retained counsel in criminal cases, and counsel appointed to represent a party pursuant to the provisions of the Criminal Justice Act, 18 U.S.C. § 3006A, Federal Rule of Criminal Procedure 44, or the inherent power of a federal court, shall file a notice of appeal upon their client's request. Defendant's trial counsel, whether retained or appointed, shall represent the defendant on appeal, unless the Court of Appeals grants permission to withdraw.

(b) *Motions to Withdraw*. A motion to withdraw on the ground that in counsel's opinion there are no non-frivolous issues to be urged on appeal must be accompanied by a brief prepared in accordance with the procedures enunciated in *Anders v. California*, 386 U.S. 738 (1967), and *Robinson v. Black*, 812 F.2d 1084 (8th Cir. 1987). A motion to withdraw on any other ground will only be granted for good cause shown, and will rarely be granted unless another attorney has entered an appearance for the defendant on appeal or another attorney has agreed to represent the defendant on appeal and the defendant has consented to the appearance of that new attorney.

Rule 28A. Briefs.

(a) *Number*. Five copies of briefs prepared pro se must be filed. Ten copies must be filed with the court in all cases handled by an attorney. Eleven additional copies must be filed in cases heard en banc. In every case, two copies of each brief must be served on counsel for each party separately represented.

A party proceeding in forma pauperis who chooses to file typewritten and carbon copies of the brief must file the original and three legible copies with the clerk and must serve one legible copy on counsel for each party separately represented. See FRAP 31(b).

(b) *Addendum*.

(1) *CONTENTS*. Appellant must prepare an addendum and file it with the opening brief. The addendum must include:

(i) a copy of the district court or administrative agency opinion or order including supporting memoranda or findings;

(ii) any magistrate's report and recommendation that preceded the district court opinion or order;

(iii) short excerpts from the record, other than from the transcript of testimony, that would be helpful in reading the brief without immediate reference to the appendix; and

(iv) other relevant rulings of the district court.

(2) *LENGTH*. The addendum must not exceed 15 pages excluding the district court or agency opinion and the magistrate's report and recommendation. The addendum will normally be incorporated into the back of the brief, but may be bound separately if it includes a long district court opinion or report and recommendation. If bound separately, the appellant must file the same number of addenda as briefs.

(3) *APPELLEE'S ADDENDUM*. The appellee's brief may include an addendum not to exceed 15 pages.

(c) *Certification of Word Processing Program*. In addition to the information required by FRAP 32(a)(7)(C), the certificate of compliance must also include the name and version of the word processing software used to prepare the brief.

(d) *Digital Versions of the Brief*.

(1) A digital version of each brief, excluding the Addendum, must be furnished to the court at the time the paper brief is filed, unless counsel certifies that filing a digital version is not practicable. The full contents of the brief must be furnished. The contents must be in a single document file.

(2) The digital version of the brief may be furnished on 3½ inch computer diskette or on a CD-ROM. Nothing else should be on the diskette or CD-ROM. The label of the diskette or CD-ROM must include the case name, docket number, and the name of the party on whose behalf the brief is filed. If a diskette is provided, the filing party must certify that the diskette has been scanned for viruses and that it is virus-free. If a CDROM is provided, the filing party must certify that the file copied to the CD-ROM has been scanned for viruses and that it is virus-free.

(3) The digital version of the brief must be in Portable Document Format (also known as PDF or Acrobat Format). The digital version must be generated by printing to PDF from the original word processing file, so that the text of the digital version of the brief may be searched and copied. PDF images created by scanning paper documents do not comply with this rule.

(e) *Briefing Schedule in Cross-Appeals; Length of Briefs in Cross-Appeals*.

(1) *SCHEDULE FOR FILING*. In cases presenting a cross-appeal, the appellee/cross-appellant's opening brief must be filed as one brief within 30 days after service of appellant's brief. Appellant's reply/cross-appellee brief must be filed as one brief within 30 days after service of cross-appellant's brief. Cross-appellant's reply brief must be filed within 14 days after service of appellant/cross-appellee's brief.

(2) *LENGTH OF BRIEFS IN CROSS-APPEALS*. *This rule was abrogated by the court on December 28, 2005. For the rules provisions governing cross-appeals, see FRAP 28(c), 28.1, 32(a)(7)(c) and 34(d).*

(f) *Contents*.

(1) *SUMMARY OF THE CASE*. Each appellant must file a statement not to exceed one page providing a summary of the case, the reasons why oral argument should or should not be heard, and the amount of time (15, 20, or 30 minutes, or in an extraordinary case, more than 30 minutes) necessary to present the argument. The summary must be placed as the first item in the brief. If appellee deems appellant's statement incorrect or incomplete, appellee may include a responsive statement in appellee's brief.

(2) *STATEMENT OF ISSUES*. In addition to the requirement of FRAP 28(a)(5), the statement of issues shall include for each issue a list of the most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions.

(g) *Incorporation by Reference.* A party may not incorporate by reference the contents of a brief filed elsewhere.

(h) *Motions to File Overlength Briefs.* Motions for leave to file overlength briefs will be granted only in extraordinary cases. A motion for permission to file an overlength brief must be submitted at least 7 days prior to the brief's due date.

Cross References. FRAP 25 (filing and service), 26 (computation of time), 28, 29, 31, 32.

Rule 30A. Designated record on appeal.

(a) *Scope.*

(1) *SOCIAL SECURITY APPEALS.* Three copies of the administrative agency record must be filed in social security cases.

(2) *PRO SE APPEALS.* In all pro se appeals, the entire district court record is available for review. If the record is available in electronic format, the court will review the electronic version of the record. At the time the pro se notice of appeal is filed, the clerk of the district court must transmit in paper format any portions of the original record which have not been filed in electronic format and attached to record events on the district court docket sheet, such as documentary exhibits, administrative records and state court files.

(b) *Methods of Preparing the Record on Appeal.*

(1) *AGREED STATEMENT AS THE RECORD ON APPEAL.* See FRAP 10(d).

(2) *JOINT APPENDIX.* See FRAP 30(a) & (b). Appellant must file three copies of the appendix with the brief.

(3) *SEPARATE APPENDICES.* Appellants may dispense with the process of preparing a joint appendix as set forth in FRAP 30(a) and (b) and submit a separate appendix with the opening brief. Appellant must notify the clerk and all opposing parties in writing of the decision to prepare and file a separate appendix within 14 days after filing the notice of appeal. Appellant must also order the transcript according to FRAP 10(b).

Appellees may file a separate appendix containing material not included in the appellant's appendix. Appellee must refer to record material found in appellant's separate appendix rather than duplicating the material.

Separate appendices must conform to FRAP 32(b) and must be fully indexed and consecutively paginated. Each party must file three copies of its separate appendix with its brief.

(4) *SUPPLEMENTAL APPENDIX.* If the parties conclude after the opening briefs have been filed that relevant material has been omitted from the joint appendix, they may agree to file a supplemental appendix. In the absence of agreement, either party may move this court to direct the clerk of the district court to transmit additional portions of the record.

In rendering judgment on appeal, this court may rely on any portion of the original record of the district court or the agency proceedings including portions not included in the designated record.

(c) *Costs.* The prevailing party may recover in this court the costs of reproducing the required number of copies of the appendix. Costs for producing the transcript may be recovered in the district court.

Unless the parties agree otherwise, the appellant must pay the cost of producing the joint appendix. The appellee, however, must advance to the appellant the cost of including parts of the record designated by appellee that the appellant deems unnecessary to determine the issues on appeal. If appellee prevails on appeal, the costs the appellee has advanced are recoverable. The cost of appellee's separate appendix is also recoverable.

The court will deny costs to parties who have caused unnecessary material to be inserted into the record. Any attorney who multiplies the proceedings in a case unreasonably and vexatiously may be held personally responsible by the court for excess costs according to 28 U.S.C. § 1927 and may be subject to disciplinary sanctions.

Cross References. FRAP 10, 11, 25 (filing and service), 26 (computation of time), 28, 30, 32; 8th Cir. R. 11A; 28 U.S.C. § 1927.

Rule 31A. Service of Briefs in Death Penalty Matters.

Number of Copies. In death penalty matters where the petitioner or defendant is represented by more than one attorney, the state Attorney General or the United States Attorney must serve each opposing counsel with two copies of the brief.

Rule 32A. Briefs and Reply Briefs Responding to Multiple Briefs.

(a) *Appellee Briefs in Consolidated Criminal Cases Involving Multiple Appellants.* In consolidated criminal appeals involving multiple appellants, the United States must file a single appellee brief. The type-volume limitations set forth in FRAP 32(a)(7)(I) apply to the brief. If the United States believes presentation of the cases would be aided by separate appellee briefs, it may file a motion, at least 7 days prior to the brief due date, setting forth good cause to file separate briefs. Inability to comply with the type-volume limitations set forth in FRAP 32(a)(7)(B)(I) is not good cause for filing separate briefs.

(b) *Reply Briefs in Appeals Involving Multiple Appellees.* In cases involving multiple appellee briefs, appellant must file a single reply brief responding to all of the appellee briefs. The type-volume limitations set forth in FRAP 32(a)(7)(B)(ii) apply to the reply brief.

Rule 32.1A. Citation of unpublished opinions.

Unpublished opinions are decisions which a court designates for unpublished status. They are not precedent. Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of *res judicata*, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well. A party citing an unpublished opinion in a document or for the first time at oral argument which is not available in a publically accessible electronic database must attach a copy thereof to the document or to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status. (Adopted January 8, 2007.)

Rule 33A. Prehearing conference program.

(a) *Scope of Program.* In any civil appeal included in the court's prehearing conference program, a conference will be held promptly to review, limit, or clarify the issues on appeal, to discuss settlement, and to consider any other matter relating to the appeal. This program does not apply to: petitions for postconviction relief, social security cases; cases dismissed below for lack of jurisdiction; interlocutory appeals certified under 28 U.S.C. § 1292(b); cases appealed under 28 U.S.C. § 1292(a)(1) and federal income tax cases.

(b) *Proceedings.* The conference will be conducted by the director of the prehearing conference program, or by a senior district judge on special assignment from the chief judge, at a site convenient to the parties. Conferences usually will be held in St. Louis, Missouri; St. Paul, Minnesota; or Little Rock, Arkansas.

(c) *Confidentiality.* Settlement-related material and settlement negotiations must be maintained in confidence by the director of the prehearing conference program or the senior district judge who conducts the conference. A judge who considers the appeal on its merits does not have access to settlement material, except as agreed by the parties.

Cross References. FRAP 33.

Rule 34A. Screening for oral argument.

(a) *Assignment of Screening Function.* The chief judge may appoint the clerk, the senior staff attorney, or a panel or panels of judges of the court to screen cases awaiting disposition.

(b) *Screening Categories.* Cases may be screened for disposition without oral argument, for abbreviated argument, or for full argument. Cases screened for full oral argument usually will be allotted 15 or 20 minutes per side. Extended argument of 30 minutes or more per side occasionally will be allotted.

(c) *Reclassification by Hearing Panel.* The panel assigned to dispose of a case may alter time allocations for oral argument or reclassify the case as suitable for disposition without oral argument.

(d) *Disposition Without Oral Argument.* The clerk will notify the parties when a case has been classified as suitable for disposition without argument. Any party may ask the court to reconsider the case for oral argument by filing a written request for reclassification within 7 days after receiving notice.

(e) *Calendar Designation.* The clerk will indicate on the calendar the time allocated for argument of each case.

Cross References. FRAP 34.

Rule 34B. Argument calendar.

Companion Cases. By order of the court, two or more cases raising similar questions may be heard together. Counsel must inform the court if they know of pending cases that raise similar questions.

Cross References. FRAP 34, 45(b).

Rule 35A. Hearing and rehearing en banc.

Petition for En Banc Disposition. A petition must not refer to or adopt by reference any matter from other briefs or motions in the case.

(1) *NUMBER.* A party seeking an en banc proceeding must file 21 copies of a petition for hearing or rehearing en banc.

(2) *FRIVOLOUS PETITIONS; COSTS ASSESSED.* The court may assess costs against counsel who files a frivolous petition for rehearing en banc deemed to have multiplied the proceedings in the case and to have increased costs unreasonably and vexatiously. At the court's order, counsel personally may be required to pay those costs to the opposing party. See 28 U.S.C. § 1927.

Cross References. FRAP 35; 8th Cir. R. 40A(b).

Rule 39A. Taxation of costs.

(a) *Taxation of Reproduction Costs.* The cost of printing or otherwise reproducing necessary copies of briefs, separate addenda, and appendices must be taxable as follows:

(1) *BRIEFS.* Unless the court has directed the parties to file a greater number of briefs, the clerk will allow taxation of costs for only ten copies of each brief, plus two copies for each party.

(2) *SEPARATE ADDENDA.* Unless the court has directed the parties to file a greater number of separate addenda, the clerk will allow taxation of costs for only ten copies of each separate addendum prepared under 8th Cir. R. 28A(b)(2), plus two copies for each party.

(3) *APPENDICES.* Unless the court has directed the parties to file a greater number of appendices, the clerk will allow taxation of costs for only three copies of each appendix, plus one copy for each party.

(4) *REPRODUCTION COSTS.* The clerk will tax reproduction costs, regardless of reproduction method, at the following rate:

Reproduction per page per copy	\$.15
Binding per brief, separate addendum, or appendix	\$ 2.00
Cover per brief, separate addendum, or appendix	\$ 2.00
Sales tax (if any)	at the applicable rate

(5) *OTHER COSTS.* The clerk will not allow taxation of other costs associated with preparation of the brief or appendix. Parties cannot recover costs for overnight or special delivery.

(b) *Filing Date.* The prevailing party may file a bill of costs within 14 days after the entry of judgment. Untimely bills will be denied unless a motion showing good cause is filed with the bill. The losing party must file any objections to the bill of costs within 14 days after being served. If a party files a motion showing good cause, the clerk may grant a 7 day extension for filing either the bill of costs or the objections.

(c) *Support for Bill of Costs.* The bill of costs must be itemized and verified. Any receipts must be attached as exhibits to the bill of costs.

Cross References. FRAP 39(c), (d).

Rule 40A. Petition for rehearing by panel.

(a) *Number.* A party must file five copies of a petition for rehearing.

(b) *Treated as Petition for Rehearing En Banc.* On the request of any judge on the panel, a petition for rehearing by a panel will be treated as a petition for rehearing en banc. Every petition for rehearing en banc, however, will automatically be deemed to include a petition for rehearing by the panel.

(c) *Successive Petitions.* Successive petitions for rehearing are not allowed. The clerk will accept for filing only one petition for rehearing from any party to an appeal and will not accept any motion to reconsider the court's ruling on a petition for rehearing or rehearing en banc.

Cross References. FRAP 27, 32(b), 35, 40;
8th Cir. R. 27A.

Rule 42A. Voluntary Dismissal of Criminal Appeals.

A criminal appeal may be dismissed only with the consent of the defendant. No motion to voluntarily dismiss a criminal appeal will be granted unless the defendant either signs the motion or consents, in a written attachment to the motion, to dismissal of the appeal.

Rule 45A. Clerk.

Clerk to Furnish Copies. When an opinion is filed, the clerk will mail a copy to counsel for each of the parties. Additional copies of an opinion will be available from the clerk for \$5.00 each. Annual subscriptions to all published opinions of the court will be available at a rate set by the court.

Cross References. FRAP 45.

Rule 46A. Admitting, suspending, and disciplining attorneys.

Applicants for admission must pay an admission fee of \$190.00, for deposit in the Attorney Admission Fee Fund. An attorney who is appointed to represent a party proceeding in forma pauperis may appear in the case without being admitted to the bar of this court.

Cross References. FRAP 46; 8th Cir. R.
47H.

Rule 46B. Student practice.

Any law student acting under a supervising attorney may appear and participate in proceedings in this court.

(a) *Eligibility.* To be eligible to appear and participate, a law student must:

(1) be a student in good standing in a law school approved by the American Bar Association;

(2) have completed legal studies equivalent to three semesters;

(3) file with the clerk of court:

(i) a certificate from the dean of the law school or a faculty member stating the student is of good moral character, satisfies the requirements listed above, and is qualified to serve as a legal intern;

(ii) a certificate stating the student has read and agrees to abide by the rules of the court, all applicable codes of professional responsibility, and other relevant federal practice rules;

(iii) a notice of appearance prescribed by the court and signed by the supervising attorney and the client in each case in which the student is participating or appearing as a law student intern; and

(4) be introduced to the court by an attorney admitted to practice in this court.

(b) *Restrictions.* No law student admitted under these rules may:

(1) request or receive compensation from the client;

(2) appear in court without the supervising attorney; or

(3) file any documents or papers with the court that have not been read, approved, and signed by the supervising attorney and cosigned by the student.

This restriction does not prevent the supervising attorney, law school, public defender, or government from paying compensation to the law student, or an agency from charging for its services.

(c) *Supervising Attorneys.* A person acting as a supervising attorney under this rule must be admitted to practice in this court and must:

(1) assume responsibility for the conduct of the student;

(2) read and sign pleadings, papers, and documents prepared by the student;

(3) advise the court of the student's participation, be present with the student at all times in court, and be prepared to supplement the student's oral or written work as the court requests or as necessary to ensure the client's proper representation; and

(4) be available to consult with the client.

(d) *Special Notice of Appearance to be filed by law student:*

SPECIAL NOTICE OF APPEARANCE

Supervising Attorney and Law Student

Title of Action

Case Docket No.

Please be advised that [name of supervising attorney] appears as attorney for [name of client] and is acting as supervising attorney for [name of law student], a law student who satisfies the requirements for student practice under 8th Cir. R. 46B.

The supervising attorney and the law student have read and agree to abide by 8th Cir. R. 46B governing student practice.

Supervising Attorney Date

Address and Phone

Law Student Date

Address and Phone

Law School Name and Address

Client Consent

I authorize [name of law student], who is being supervised by my attorney, [name of attorney], to appear in court and other proceedings on my behalf and to prepare documents on my behalf. My attorney must be present when the law student appears in court.

_____	_____
Client	Date

Address	

Rule 47A. Summary disposition.

(a) *On Motion of Court.* The court on its own motion may summarily dispose of any appeal without notice. However, in an in forma pauperis appeal in which a certificate of appealability has been issued, the court will afford 14 days’ notice before entering summary disposition if the briefs have not been filed.

The court will dismiss the appeal if it is not within the court’s jurisdiction or is frivolous and entirely without merit. The court may affirm or reverse when the questions presented do not require further consideration.

(b) *On Motion of Parties.* The appellee may file a motion to dismiss a docketed appeal on the ground the appeal is not within the court’s jurisdiction. Except for good cause or on the motion of the court, a motion to dismiss based on jurisdiction must be filed within 14 days after the court has docketed the appeal.

On expiration of the time allowed for filing or express waiver of the right to file a response, or on receipt of the response, the clerk will distribute to the court the briefs filed, the record on appeal, and the motion and response. The court will consider the motion and enter an appropriate order.

Except as the court orders, the filing of a motion to dismiss does not toll the time limitations set forth in the Federal Rules of Appellate Procedure or these rules.

Rule 47B. Affirmance or enforcement without opinion.

A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision:

- (1) a judgment of the district court is based on findings of fact that are not clearly erroneous;
- (2) the evidence in support of a jury verdict is not insufficient;
- (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or
- (4) no error of law appears.

The court in its discretion, with or without further explanation, may enter either of the following orders: “AFFIRMED. *See* 8th Cir. R. 47B”; or “ENFORCED. *See* 8th Cir. R. 47B.”

Rule 47C. Attorney fees.

(a) *Motion for Fees.* A motion for attorney fees, with proof of service, must be filed with the clerk within 14 days after the entry of judgment. The party against whom an award of fees is sought must file objections to an allowance of fees within 14 days after service. The court may grant on its own motion an allowance of reasonable attorney fees to a prevailing party.

(b) *Determination of Fees.* On the court's own motion or at the request of the prevailing party, a motion for attorney fees may be remanded to the district court or administrative agency for appropriate hearing and determination.

(c) *Mandate.* The clerk will prepare and certify an award of attorney fees granted by the court for insertion in the mandate. Issuance of a mandate will not be delayed for an award of attorney fees. If a mandate issues before final determination of a motion for attorney fees, the clerk of the district court, on the request of the clerk of this court, will add the award and its amendments to the mandate.

Rule 47D. Assignment of judges; quorum.

(a) *Assignment of Judges; Quorum.* According to 28 U.S.C. § 46, the judges of the court of appeals sit as the court directs. Unless a hearing or rehearing before the court en banc is ordered as provided by FRAP 35, a panel of not more than three judges will hear and determine all cases.

(b) *Quorum; Absence of Quorum.* A majority of the judges comprising the court constitutes a quorum. If less than a quorum is present on any day of the term, any judge in attendance may adjourn the court until a later time or, if no judge is present, the clerk may adjourn the court.

Rule 47E. Death or disability of judge.

If a judge sitting on a panel that has heard argument or taken under submission any appeal, petition, or motion becomes unable to consider the matter further because of death, illness, resignation, or incapacity, or is relieved of the case at the judge's request, the remaining two judges will determine the matter. Either remaining judge may, however, request the designation of a third judge. If either judge requests a designation or if the two judges do not agree on the matter, the chief judge will designate another circuit judge to sit in place of the judge who no longer serves on the panel. The clerk will advise the parties of a designation, but no further argument or additional briefs will be received unless the court orders otherwise.

Rule 47F. Court libraries.

The court's libraries are open to members of the Eighth Circuit bar, the United States Attorneys of the circuit and their assistants, other government law officers, and with permission, other public users. Only court personnel may remove books from the buildings where libraries are maintained.

Rule 47G. Ban on practice of law; postemployment restriction.

No one employed as a staff attorney to the court, as a chambers attorney to a member of the court, or in any other capacity with the court, may

engage in the practice of law while employed by the court. An employee must not participate in any way as an attorney in any case pending in the court during the employee's term of service, or appear at counsel table or on brief in any case for a period of one year after leaving court employment.

Rule 47H. Attorney admission fee fund.

(a) *Use of Fund.* The court will maintain an Attorney Admission Fee Fund to receive admission fees and other funds not required to be deposited in the Treasury of the United States. The Fund may be used for:

- (1) expenditures related to attorney admission proceedings;
- (2) continuing legal education programs involving bench and bar;
- (3) publication of rules, procedures, and plans of the court of appeals, the judicial council, or federal advisory committee for distribution to the bar;
- (4) expenditures relating to the court's libraries;
- (5) reimbursement of reasonable out-of-pocket expenses incurred by court-appointed attorneys representing indigents in civil cases not covered by the Criminal Justice Act; and
- (6) any other purpose set out in the guidelines prepared by the Attorney Admission Fee Fund Committee and adopted by the court of appeals on July 2, 1985.

(b) *Custodian of Fund.* The circuit executive will serve as custodian of the Attorney Admission Fee Fund. As custodian, the circuit executive will make expenditures from this fund as directed by the Attorney Admission Fee Fund Committee and the chief judge, will keep an account of the receipts and disbursements of the Fund for examination and approval by the Committee, and will give bonds as the Committee may require.

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